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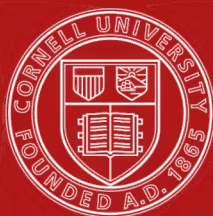
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A TREATISE
ON THE
LAW OF EVIDENCE

WITH A
DISCUSSION OF THE PRINCIPLES AND RULES
WHICH GOVERN ITS PRESENTATION,
RECEPTION AND EXCLUSION,

AND THE
EXAMINATION OF WITNESSES IN COURT.

BY
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TO
MY FRIEND AND FORMER INSTRUCTOR,
C. G. TIEDEMAN, Esq.,
PROFESSOR OF LAW IN THE UNIVERSITY OF THE CITY OF NEW YORK,
THIS VOLUME IS RESPECTFULLY DEDICATED,
AS A
TRIBUTE OF THE AUTHOR'S APPRECIATION OF HIS LEARNING
AND ABILITY AS A SCHOLAR, AND HIS INTEG-
RITY AND KINDLINESS AS A MAN.

PREFACE.

The primary purpose of the author in the preparation of this work is to present in a concise and clear narrative a reasonably comprehensive statement of the rules and principles of the existing law of evidence, for the use of students of law pursuing their studies in law schools or elsewhere. Though this is the main object of the work, the author is not wholly without hopes that it may also be of some service to the profession; and with this end in view a full citation of the most recent and most important cases has been made, which, with a carefully prepared topical and analytical index, will, it is believed, facilitate the convenient use of the book in many, if not in all, the exigencies of practice.

In order to secure conciseness it was found necessary to omit the detailed discussion of many things which, though interesting to the historical investigator or antiquarian, are obsolete and useless to the student. The author has not hesitated, however, when the occasion seemed to demand it, to discuss dead or obsolete law if the discussion is essential to a proper elucidation or understanding of the law of the present.

The evolution of the law of evidence from a mass of arbitrary and inadequate rules, based upon the conservatism and prejudice which could see nothing but good in the past, into a well-reasoned and flexible system of jurisprudence adapted to the demands of the spirit of a progressive age, may be attributed to a variety of causes. The application of the principle of logic to the law of evidence, resulting from the labors

of Bentham and his followers, doubtless had much to do in exploding the theory propounded by some of the earliest writers, that it was not only useless but absolutely harmful to seek to find a reason for any of the rules of evidence. So, too, coincident with the process of rehabilitation and evolution which has been going on in the law itself as the result of its development along logical lines and the operation of public opinion acting through a progressive and enlightened judiciary, may be considered the express statutory changes which have been made and some of which are embodied in the codes of procedure which exist in many of the states.

Other influences as well have been at work. The spread of popular education, the vast increase in and the new uses which have been found for wealth, the progress of scientific investigation, the application of newly-discovered scientific principles to every day-affairs, and the extensive use of machinery for purposes of transportation and manufacture, have all combined to bring about great changes in the law and particularly in the law of evidence.

The result of all this is, that while the law of evidence has been rendered more logical and better adapted to the demands of a progressive social state, many questions have been cast into the back-ground which fifty years ago were of the utmost importance. On the other hand, other subjects and questions have been brought forward for the consideration of the student or attorney, and for discussion in the forum.

Accordingly it will be found that, while some matters which are treated by the older authorities at some length receive only cursory attention in this volume, leaving the reader to pursue his investigations of the details regarding them in the authorities cited, other departments of the law of evidence — as, for example, expert and opinion evidence, *res gestæ*, relevancy, the statutory incompetency of interested witnesses to testify to personal transactions with a decedent,

privileged communications to doctors, attorneys and clergymen, the inspection of persons and things by the jury, comparison of handwriting, the use of pleadings as evidence, stipulations, objections to evidence, etc.,—have received the full consideration their modern importance demands.

In citing the most recent cases the author has endeavored to give the citation from the state report as well as that from the National Reporter system. In many cases where it was not practicable to give the state report citation in the notes, it will be found appended to the case in its proper place in the table of cases. Where it is not given in the table of cases, the reader may feel assured that the case has not been reported by the state reporter up to the time that this work goes to press.

Trusting that his work may prove of value in lightening the labors of practitioner and student, and that though either may not find in these pages a solution for every possible or conceivable problem with which he may be confronted, yet, believing that what is found will neither mislead nor confuse, the author presents his work to the indulgence of the public.

H. C. UNDERHILL.

59 REID AVE., BROOKLYN, N. Y.,
September 10, 1894.

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THE LAW OF EVIDENCE.

INTRODUCTORY CHAPTER.

- § 1. Early development of law.
- 2. Evidence defined.
- 3. The basis of belief.
- 4. Direct and circumstantial evidence distinguished.

- § 5. Nature and effect of circumstantial evidence.
- 6. Reasonable doubt and the weight of evidence.

§ 1. **Early development of law.**— All law, whatever its ultimate form, is in its origin the result of customs observed in social and commercial intercourse, which often have their commencement at a date long anterior to the existence of any regular form of government. Thus, long before any supreme political authority exists, it is found that rules are practiced regulating the family relation, the making of contracts, the rights of ownership, and the punishment of violence.

When human controversies ceased to be wholly adjusted by force and came before the primitive tribunals which obtain in the early history of every nation, these customs, which are merely a reflection or embodiment of the existing popular morality, are impressed with the character of legal rules by their recognition by the courts.

Early procedure is conservative and artificial. The judges are of necessity compelled to rely on custom and precedent. The private rights which grow up around and are based upon the old custom which has become a rule of law demand rigidity and unchangeableness.

Early law is always developed as a system of procedure, and by rude and ignorant peoples form and substance are usually confounded. A blind devotion to the letter, causing hardship and injustice, is the dominating character of early jurisprudence. This was particularly true of the English

common law, as it was slowly developed by the judicial interpretation and recognition of feudal principles and customs.

The extreme technicality of the common law regarding the ownership of real property, and the framing of pleading in an action, is well known. Hence it need occasion no surprise that when the rules of legal evidence began to be formulated in connection with the development of modern social and commercial progress, they were based upon arbitrary principles and infected with the prejudices and superstitions of a rude and unlettered age.

So we find at various periods this branch of the law has been influenced and acted upon by such arbitrary and barbarous conceptions as that a man would lie if permitted to testify for himself, or that truth could be accurately ascertained by the employment of physical torture inflicted on the accused, or by compelling him to submit to a cruel ordeal. But the advance of scientific, commercial and political ideas, with the progress of modern ideas bringing about legal reforms, has had a most important re-action upon the law of evidence. That law is no longer harsh, technical and irresponsible to the demands of progressive civilization, but adaptable to the needs of an age in which considerations of simplicity and justice are paramount to forms and precedents, and when the demand is not only for logical development and coherence, but for flexibility to new uses and needs and economy and speed in administration.

Hence, at the present day, the sole tests which should be applied to ascertain the utility of a rule of evidence are, first, does it, while admitting all facts which bear upon the issue, tend to shorten or simplify legal proceedings; and second, is it calculated to render this evidence more valuable by making it more cogent and trustworthy.

§ 2. Evidence defined.—The word "evidence" having been so frequently defined, it is unnecessary for the author to attempt another definition, though it may be of use to ascertain what elements these definitions have in common, and what idea is conveyed by all of them. It will be seen that they agree that legal evidence is only a means to an end, and that this end is the ascertainment of truth in the clearest and most speedy manner.

The truth of any statement of fact, when ascertained, is said to be proved; or, when mathematical truth is concerned, the word "demonstration" is used, which excludes all possibility of the existence of error.¹

In the conduct of our every-day affairs we cannot expect, and hence have no right to insist upon, a demonstration of the truth of every statement of fact that is made.² We must be content with evidence that will convince us beyond a reasonable doubt and render it easier to believe that a given proposition is probably true.³

Cumulative evidence means additional evidence of the same character to support the same point as other evidence already given.⁴

Corroborative evidence is additional evidence proving similar facts, or facts calculated to produce the same result as facts already given in evidence.

Partial evidence is evidence of one fact in a series which tends to prove the fact in issue.⁵

¹ 1 Greenl. on Ev., § 13.

² "Facts are the sources or materials of evidence; evidence is the medium by which facts are present." Bouv. Law Dict.

³ "Evidence means and includes, first, all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry; such statements are called oral evidence. Second, all documents produced for the inspection of the court; such documents are called documentary evidence." Indian Evidence Act, § 3.

"Evidence means, first, statements made by witnesses in court under a legal sanction in relation to matters of fact; such statements are called oral evidence. Second, documents produced for the inspection of the court or judge; such documents are called documentary evidence." Stephen, Digest of Evidence, art. 1.

"The word 'evidence,' in legal ac-

ception, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." Greenleaf on Evidence, § 1.

"Evidence includes the reproduction before the determining tribunal of the admission of parties and of facts relevant to the issue. Evidence is adduced only by the parties through witnesses, documents or inspection." Wharton on Evidence, § 3.

The word "evidence," considered in relation to law, includes all the legal means, exclusive of mere argument, which tend "to prove or disprove any matter of fact the truth of which is submitted to judicial investigation." Taylor on Evidence, § 1 (Text-book Series).

⁴ People v. Supervisors, 10 Wend. 293; Guyot v. Butts, 4 id. 582; Parker v. Hardy, 24 Pick. 246, 248.

⁵ McCarnay v. People, 83 N. Y. 408, 414, 415.

§ 3. **Basis of belief.**—It is a truism to say that most of the knowledge which is possessed by any individual is derived from information imparted by others. So we must recognize the truth that the disposition to believe, or, in other words, to rely upon what others tell us, is inherent in humanity until, by repeated acts of deception practiced upon us, we become incredulous and learn to distrust the statements of other men.

Thus at a comparatively early period in life we learn by experience of the falsehoods uttered in our hearing that an urgent necessity exists for the use of rules and principles by which the truth of what is said may be separated from that which is false.

In the first place, the probability of any new fact with which we become acquainted constitutes a strong, although not the sole, ground for a belief in its truth. If the new fact is consistent with others which we already know or believe to be true, less evidence, or evidence of a less satisfactory character, is required to convince us of its truth than where the new fact is wholly unlike anything in our experience.

The confirmation of the truth of any new fact by knowledge already possessed will vary in proportion to the nature of the fact communicated and the situation of the individual. Thus a statement involving a new scientific discovery, as, for example, that oral communication can be had by the telephone between persons hundreds of miles apart, will be regarded as extremely probable or as utterly absurd according as it is made to a well-educated man or to an illiterate savage.

So, though the direct evidence of a witness is uncontradicted, the jury may refuse to believe it, if from its inconsistency and improbability they conclude that it is false.¹

Though we may have been repeatedly deceived by the misrepresentations of others, we find by experience that men, as a rule, tell the truth. Where neither prejudice nor passion exists, and where an individual has no private interests to advance by distorting truth, we may rely upon the credibility of his testimony, if we believe him to be a man of intelligence, possessing adequate powers and opportunity for acquir-

¹ *Hawkins v. Sauby*, 48 Minn. 69; *Jengren* (Minn., 1892), 52 id. 219. See 50 N. W. Rep. 1015; *Anderson v. Lil-* 1 Greenl. on Ev., §§ 7-11.

ing knowledge. But where the testimony of persons, such as police and private detectives and others engaged in the detection of crime, or expert witnesses who are under pay,¹ who from character or position are inclined to take prejudiced or distorted views is involved, it will require a high degree of evidence to satisfy the mind of an impartial hearer.²

Again, the well-recognized connection often observed between collateral or subordinate facts which are proved or admitted and the main fact in issue frequently furnishes most cogent and satisfactory proof of the existence of the latter. This is only applying to the law of evidence the principles of inductive reasoning, which are used, often unconsciously, by all men in the conduct of their most trivial as well as of their most important affairs. It furnishes a basis for the division of evidence into direct and circumstantial, while on the other hand, by permitting the jury in a cause to draw inferences or presumptions from the facts, it has opened the door for the creation of presumptions of law.

Another incident affecting the credibility of evidence is found in the frequent occurrence of undesigned coincidences, which, though sometimes startling and unexpected, are unaccountable except upon the hypothesis that the narrative of which they are a part is true.³ No event stands alone. It is the result of others which preceded it. It may in its turn be the fruitful cause of many others which follow or relate to it. So every fact or circumstance is connected with others of a collateral nature, rendering it well nigh impossible for one to concoct a narrative which on comparison with other and related circumstances will stand the test.⁴ Even by comparing the various parts of the story, a mind trained in the habit of investigation may quickly ascertain the truth or falsehood; for in such a case the fabrication, however skilfully constructed, will crumble to pieces by reason of its inherent lack of verity.⁵

¹ "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." *In re Tracy*, 10 Cl. & F. 191. See *post*, § 188.

² *Cen. R. Co. v. Attaway* (Ga., 1893), 16 S. E. Rep. 956.

³ *United States v. Ybanez*, 53 Fed. Rep. 536.

⁴ 1 Greenl. on Ev., §§ 9, 12.

⁵ *In Fife, Jones & Stewart v. Com.*,

§ 4. Direct and circumstantial evidence distinguished.—

By direct evidence is meant evidence of such facts as constitute the actual and present subject of the judicial investigation; in other words, of those facts which are directly in issue between the parties. To say that the evidence is direct is equivalent to declaring that what the witness testifies to as having seen or heard is the fact or facts which are affirmed and controverted by the parties. In such a case the evidence has a direct and uninterrupted bearing and application to the facts to be proved. But where the facts seen or heard by the witness have, when shown, no direct bearing on the facts in issue, but require a course of reasoning or inference before their application to the latter can be apprehended, or before the truth or falsity of the latter facts can be presumed, the evidence is circumstantial.¹

So where the dead body of defendant's wife is found with her throat cut in a manner which could not have been self-inflicted, and it is shown that defendant was seen in her company the evening previous; that near the body was found a razor, a walking-stick that defendant admitted was his, and a cuff button; that defendant's razor was missing; that the cuff button matched one in his possession, and that he had abandoned his wife, accusing her of infidelity, a chain of circumstances is forged leading irresistibly to the conclusion that he murdered her.²

Whether the evidence be direct or circumstantial, the truthfulness of the witness may be presumed by the jury; but in the latter case a further presumption is made, and the exist-

29 Pa. St. 429, 438, the court said: "It must be remembered that jurors are men, and that it is because they have human hearts and sympathies and judgments that they are selected to determine upon the rights of their fellowmen. . . . Their oaths as *jurors* rest on their consciences as *men*, and as men they are accountable to God and to their country for their verdict. Nothing more is demanded." See 1 Greenl. on Evid., § 12.

¹ "Circumstantial evidence is the proof of certain facts in a given case from which the jury may infer other connected facts which usually and reasonably follow, according to the common experience of mankind." State v. Avery (Mo., 1893), 21 S. W. Rep. 193.

² People v. Hamilton, 137 N. Y. 531. See, also, Moreno v. State (Tex., 1893), 21 S. W. Rep. 924.

ence or non-existence of the facts in issue is deduced from the proved existence of other facts.¹

From the nature of circumstantial evidence it follows that its force wholly depends upon the fact that in each case some direct evidence has been given from which the presumption or inference may arise.

So in the class of cases in which fraud is alleged, or in which it is said that fraud will be presumed from the circumstances of the parties, direct evidence of a clear and satisfactory character must be adduced before the existence of fraud will be presumed; and the facts and circumstances must be established beyond a reasonable doubt.²

The admissibility of circumstantial evidence depends solely upon the strength and distinctness of the logical connection between the facts proved and the inference which may be made by the jury; in other words, whether such evidence is receivable depends upon its relevancy to the fact in issue. The question of relevancy is one for the decision of the judge. To guide him in his decision upon the remoteness of the evidence offered no general rule can be enunciated. Each case must necessarily be decided on its own circumstances, subject to the general qualification that all the evidence offered, to be admissible, must tend to prove or disprove the fact in issue.³

§ 5. Nature and effect of circumstantial evidence.—Circumstantial evidence is divided by the authorities into that which is certain and that which is uncertain. In the former

¹ *Com. v. Harmon*, 4 Pa. St. 269.

"The advantage of circumstantial evidence is that, as it commonly comes from different sources, a chain of circumstances is less likely to be falsely prepared and falsehood is more likely to be detected. The disadvantage is that the jury have not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which there may be led to make hasty and false deductions—a source of error not existing in the consideration of positive evidence. Hence, each fact necessary

to the inference must be distinctly and independently proved by competent evidence; and the inference must be fair and natural, not forced or artificial." *Webster's Case*, 5 Cush. 311. See *Com. v. Howe*, 132 Mass. 259.

² *McAlee v. McMurray*, 58 Pa. St. 126; *Douglass v. Mitchell*, 35 id. 440; *United States v. Ross*, 92 U. S. 281; *Kaiser v. State*, 85 Neb. 704; *State v. Hunter*, 50 Kan. 302; *Kennedy v. State*, 12 S. Rep. 858 (Fla., 1893); *Hutchison v. Boltz*, 35 W. Va. 754.

³ See §§ 7-10.

class the conclusion follows necessarily where the premises are established; in the latter it may or may not follow, according to the course of reasoning pursued by the jury.¹ This classification, however, is of small practical value, for the weight of circumstantial evidence and the power to draw inferences from it are matters which are wholly in the hands of the jury, and they are not under the necessity of being convinced by any degree of circumstantial evidence, however satisfactory or certain it may appear. It is the duty of the judge to instruct them as to the rules regulating the subject, and where the evidence is wholly circumstantial it is reversible error for him to refuse to do so.²

So though the jury may, under the direction of the judge as to the law, weigh the evidence and compare that which is circumstantial with that which is direct, they are under no sort of obligation to reject the former in favor of the latter, or to ascribe to either any higher degree of probative force than to the other. So the credibility of either description of evidence depends on its intrinsic merit, as regards truthfulness and probability.³ A conviction of crime may be had on circumstantial evidence alone, provided the jury are convinced beyond a reasonable doubt.⁴ In other words, the circumstances should be not only consistent with the prisoner's guilt, but irreconcilable with any other rational hypothesis.⁵

¹ 1 Greenleaf on Evidence, § 13a.

² Crowell v. State, 24 Tex. App. 404; Boyd v. State, 24 id. 570; Crowley v. State, 10 S. W. Rep. 217; 26 Tex. App. 278. But where no question of circumstantial evidence is involved the court need not instruct the jury upon the rules governing it. Langdon v. People, 133 Ill. 382; 24 N. E. Rep. 874; Smith v. State, 28 Tex. App. 309; Wampler v. State, 28 Tex. App. 352; Vaughan v. State (Ark., 1893), 20 S. W. Rep. 588; Cotton v. State, 87 Ala. 75.

³ People v. Morrow, 60 Cal. 142; State v. Slingerland, 19 Nev. 135; Clark v. Com., 123 Pa. St. 555. "Nothing in the nature of circumstantial evidence renders it less re-

liable than other evidence." People v. Orquidas, 96 Cal. 239.

⁴ Kaiser v. State, 35 Neb. 704; State v. Hunter, 50 Kan. 302; Kennedy v. State (Fla., 1893), 12 S. Rep. 858.

⁵ State v. Avery (Mo., 1893), 21 S. W. Rep. 21; Nail v. State (Miss., 1893), 11 S. Rep. 793; State v. Davenport (S. C., 1893), 17 S. E. Rep. 37; State v. Taylor, 20 S. W. Rep. 239; 111 Mo. 538; State v. Milling, 35 S. C. 16; 14 S. E. Rep. 284; Williamson v. State, 30 Tex. 330; 17 S. W. Rep. 722; State v. Woodward (Iowa, 1892), 50 N. W. Rep. 885; People v. Dillwood, 94 Cal. 89; United States v. McKenzie, 35 Fed. Rep. 826; Leonard v. Territory, 2 Wash. T. 281; Overman v. State, 49 Ark. 364; Dean

§ 6. Reasonable doubt and the weight of evidence—Alibi in criminal trials.—Where civil rights are involved, extreme strictness of proof is not required, and the jury may decide for either party according to the probability and weight of evidence, so long as their verdict be in favor of that litigant upon whose side the evidence preponderates.

The jury in criminal cases, however, are not permitted to base their verdict on a mere preponderance of proof, but are required, particularly where the evidence is circumstantial or contradictory, to be satisfied beyond a reasonable doubt that the accused is guilty.¹

The rule that a preponderance of evidence is sufficient in a civil suit is based upon the fact that proof arrived at by the verdict will only result as a judgment for pecuniary damage or establish a civil right. But in a criminal trial the accused starts with a presumption of innocence which must be overcome in addition to the evidence which he may adduce in his own behalf. So the character, and perhaps the life, of the ac-

v. Com., 32 Gratt. 912; Davis v. State, 74 Ga. 869; Russell v. Com., 78 Va. 600; Swigar v. State, 109 Ill. 372; Poe v. State, 10 Lea (Tenn.), 673; State v. Anderson, 10 Oreg. 448; State v. Smith, 73 Iowa, 32; Com. v. Robinson, 146 Mass. 371; Yates v. People, 32 N. Y. 509; Com. v. Webster, 59 Mass. 295; West v. State, 76 Ala. 98; People v. Beckwith, 108 N. Y. 67; State v. Johnson, 37 Minn. 493; People v. Reich, 110 N. Y. 660; Jones v. State, 57 Miss. 684; State v. Brewer, 98 N. C. 607.

“Perhaps strong circumstantial evidence, in cases of crimes committed for the most part in secret, is the most satisfactory of any from which to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the ac-

cuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.” 1 East, P. C., ch. 5, § 9.

¹ Pierce v. State (Tex., 1893), 22 S. W. Rep. 587; State v. Johnson, 37 Minn. 493; Coleman v. State, 111 Ind. 563; People v. Flynn, 73 Cal. 511; Hopt v. People, 7 S. Ct. 614; McMeen v. Com., 114 Pa. St. 300; McKee v. State, 82 Ala. 32; Graves v. People (Colo., 1893), 32 Pac. Rep. 63; Bramlette v. State, 21 Tex. App. 611; 2 S. W. Rep. 765; State v. Blunt, 91 Mo. 503; Gardiner v. State (N. J., 1893), 26 Atl. Rep. 30; Gentry v. State (Tex., 1893), 20 S. W. Rep. 551; McDuffie v. State (Ga., 1893), 17 S. E. Rep. 505; Woodruff v. State (Fla., 1893), 12 S. Rep. 653; State v. Grant (Iowa, 1893), 53 N. W. Rep. 120; Weaver v. People, 132 Ill. 536; Taylor v. Com. (Va., 1893), 17 S. E. Rep. 81; Kelly v. People, 17 Colo. 130; Cross v. State, 132 Ind. 65;

cused is involved, while in civil cases the loss he may sustain, however great, may be retrieved by his future efforts.¹

But where the commission of a crime is in issue in a civil suit, an irreconcilable lack of harmony prevails in the decisions. In England,² and in some of the states of the Union, it is held that where the existence of a criminal intent is in issue in a civil proceeding, the party alleging the intent must prove its existence beyond a reasonable doubt.³ But the weight of the decisions is adverse to this proposition, for the great majority of them support the rule that an accusation of crime in a civil suit may, like any other fact in issue, be proven by a preponderance of evidence.⁴

The meaning of the phrase "reasonable doubt" has been the subject of much discussion, and many attempts have been made to define it.⁵ Thus it has been defined as "a doubt for

Hunter v. State, 29 Fla. 486; State v. Turner, 110 Mo. 196; Palmerston v. Ter., 3 Wyo. 333; State v. Whiton, 111 N. C. 695; People v. Kerr, 6 N. Y. Crim. R. 406; United States v. Meagher, 37 Fed. Rep. 875; Perry v. State, 87 Ala. 30; State v. Grant (Iowa, 1893), 53 N. W. Rep. 120.

¹ See remarks of the court in *Mut. F. I. Co. v. Usaw*, 112 Pa. St. 89.

² Stephen's Dig., art. 94.

³ *Polston v. See*, 46 Iowa, 30; *Mead v. Husted*, 52 Conn. 56; *Williams v. Dickerson*, 28 Fla. 90; *Barton v. Thompson*, 46 Iowa, 30.

⁴ *Gordon v. Parmlee*, 15 Gray (Mass.), 413; *Ellis v. Burrell*, 60 Me. 209; *Burr v. Wilson*, 22 Minn. 206; *Munson v. Atwood*, 30 Conn. 102; *Bissell v. West*, 35 Ind. 54; *Weston v. Gravlin*, 49 Vt. 507.

⁵ *State v. Whitson*, 16 S. E. Rep. 332; 111 N. C. 695.

"As to questions relating to human affairs a knowledge of which is derived from testimony, it is impossible to have the kind of certainty created by scientific demonstration. The only certainty we can have is a moral certainty, which depends upon

the confidence placed in the integrity of witnesses and their capacity to know the truth. If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent, uncontradicted, and who had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case a doubt would be unreasonable, imaginary or speculative, which it ought not to be. It is not a doubt whether the party may not possibly be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called reasonable. And even where the testimony is contradictory, so much more credit may be due to one side than the other and the same result will be produced. On the other hand, the opposing proofs may be so nearly balanced that the jury may justly doubt on which side lies the truth. In such case the accused is entitled to the benefit of the doubt. As certainty advances doubt recedes. If one is reasonably certain he cannot at the same time be reasonably

which a reason can be given;"¹ as a doubt that must satisfy a reasonable mind after a full comparison and consideration of the evidence;² as "a doubt that has something to rest upon, and such as a sensible, honest-minded man would reasonably entertain;"³ as a doubt growing out of the evidence and circumstances of the case,⁴ having a foundation in reason;⁵ a substantial doubt, and not a mere possibility of innocence;⁶ and as an honest, substantial misgiving generated by insufficiency of proof.⁷ But a mere whim, groundless surmise,⁸ vague conjecture,⁹ captious doubt or misgiving suggested by an ingenious counsel, or arising from a merciful disposition towards defendant or from sympathy for him or his family,¹⁰ is not a reasonable doubt.¹¹

doubtful—that is have a reasonable doubt of a fact. All that a jury can be expected to do is to be reasonably or morally certain of the fact which they declare by their verdict." By Cox, J., in *United States v. Guiteau*, 10 Fed. Rep. 164.

¹ *Hodge v. State* (Ala., 1893), 12 S. Rep. 164; *Cohen v. State*, 50 Ala. 108.

² *Wood v. State* (Fla., 1893), 12 S. Rep. 539.

³ *Fletcher v. State* (Ga., 1893), 17 S. E. Rep. 100.

⁴ *Territory v. Chavez* (N. M., 1893), 30 Pac. Rep. 903.

⁵ *Conrad v. State*, 31 N. E. Rep. 805; 132 Ind. 254.

⁶ *State v. Wells*, 111 Mo. 533.

⁷ *United States v. Newton*, 52 Fed. Rep. 275. See, also, *Siberry v. State* (Ind., 1893), 33 N. E. Rep. 681; *People v. Kerm* (Utah, 1893), 30 Pac. Rep. 988; *Lovett v. State*, 30 Fla. 142; *Lyons v. People*, 137 Ill. 602; *Carroll v. Same*, 136 id. 456; *Woodruff v. State* (Fla., 1893), 22 S. Rep. 653; *People v. Pallister*, 138 N. Y. 601.

"A reasonable doubt is such a doubt as the term itself implies. It is difficult to explain what a reasonable doubt is. It means a doubt that

has something to rest upon; some reason that it is based on; such a doubt as would control you and you would be governed by in your important business affairs. It means such a doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation after truth; a doubt that would arise from the evidence or the want of evidence in the case. It does not mean a mere vague conjecture or a bare possibility of the innocence of the accused." *Fletcher v. State* (Ga., 1893), 17 S. E. Rep. 100.

⁸ *Welch v. State* (Ala., 1893), 11 S. Rep. 450.

⁹ *Fletcher v. State* (Ga., 1893), 17 S. E. Rep. 100.

¹⁰ *United States v. Newton*, 52 Fed. Rep. 275.

¹¹ *Territory v. Baningan*, 1 Dak. 432; *Spies v. People* (Anarchist Case), 123 Ill. 8; *Schusler v. State*, 29 Ind. 394; *Horn v. State*, 1 Kan. 42; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; *Com. v. Harman*, 4 Pa. St. 269; *Brotherton v. People*, 75 N. Y. 159; *McMeen v. Com.*, 114 Pa. St. 300; *State v. Anderson*, 86 Mo. 309; *Bradshaw v. State*, 17 Neb. 147.

Where the prisoner pleads an affirmative defense as an *alibi*, or denies that any crime has been committed, the burden of proof is on him to show the fact. He need not, however, prove the fact beyond a reasonable doubt. Thus, in proving an *alibi*, the jury should acquit if the prisoner is able to show by a preponderance of evidence that he was "elsewhere" at or about the time the crime was committed, and that he was at the place alleged such a length of time that he could not have committed the crime with which he is charged.¹

It is the duty of a jury to weigh the evidence, and it is not for the court to place restrictions upon this power. They may, where evidence is conflicting, reject that which is direct and rely wholly upon that which is circumstantial.² So it has been held error, under such circumstances, for the court to instruct them that the circumstances must not be vague, indefinite or uncertain, but convincing and clearly defined.³ So a jury is not compelled to draw an inference that would necessarily follow upon the facts proven, but may come to any reasonable and probable conclusion justified by the evidence.⁴ So

¹State v. Reed, 62 Iowa, 40; People v. Pearsall, 50 Mich. 233; Stuart v. People, 42 Mich. 255; Landis v. State, 70 Ga. 651; Binns v. State, 46 Ind. 311; Watson v. Com., 95 Pa. St. 418; State v. Josey, 64 N. C. 56; State v. Watson, 7 S. C. 63; Klein v. People, 113 Ill. 596. In other words, if the defendant by his evidence of an *alibi* succeeds in creating a reasonable doubt that he committed the crime, then it is for the state to overcome that doubt. In no case is the prisoner compelled to satisfy the jury beyond a reasonable doubt that he did not commit the crime. Bennett v. State, 30 Tex. App. 341; People v. Fong, 64 Cal. 253; State v. Sanders, 106 Mo. 188; State v. Edwards, 109 Mo. 318. See *post*, § 240. The jury may be cautioned that witnesses may be honestly mistaken as to times and places and that an *alibi* may be easily fabricated. People v. Wong (Cal.), 10

Pac. Rep. 275. But the law does not regard evidence to prove an *alibi* with any greater degree of suspicion than any other sort of defense. Albin v. State, 63 Ind. 598; Line v. State, 51 id. 172; Spenser v. State, 50 Ala. 124. Though a presumption is created against a prisoner when he is detected in falsely swearing to an *alibi* (Porter v. State, 55 Ala. 95; Com. v. McMahon, 145 Pa. St. 413), still it has been held erroneous to charge that an unsuccessful attempt to prove an *alibi* is to be considered as a circumstance of great weight against the accused. People v. Molaspina, 57 Cal. 628; Caffey v. State, 94 Ala. 76. ²Bowie v. Maddox, 29 Ga. 285; Deland v. Dixon Nat. Bank, 111 Ill. 327.

³State v. Allen, 103 N. C. 433; McClesky v. State (Tex., 1892), 13 S. W. Rep. 997.

⁴127 Ill. 507.

to warrant a conviction on circumstantial evidence it has been held that each fact leading up to the inference drawn must be proven beyond a reasonable doubt, and the facts thus proven should be consistent with each other and with the guilt of the person accused.¹

On the other hand, many cases hold, and this perhaps is the better rule, that the jury need not be satisfied beyond a reasonable doubt of the truth of every fact alleged, if, upon the whole evidence they are satisfied of the guilt of the accused beyond a reasonable doubt.²

¹ Gallaher v. State, 28 Tex. App. Rep. 905; Weaver v. People, 132 Ill. 247; Rains v. State, 88 Ala. 91; 536; Siebert v. People (Ill., 1893), 32 Graves v. People (Colo., 1893), 32 Pac. N. E. Rep. 431; Harnish v. People Rep. 63. See Timmerman v. Ter., 17 (Ill., 1893), 32 N. E. Rep. 677; Jamison Pac. Rep. 624; Cotton v. State, 87 Ala. v. People (Ill., 1893), 34 N. E. Rep. 468; 75; Coleman v. State, 87 id. 14. Timmerman v. Ter., 17 Pac. Rep.

² State v. Wells, 111 Mo. 533; 624; State v. Crane, 15 S. E. Rep. Faulkner v. Ter. (N. M., 1893), 30 Pac. 231; 110 N. C. 530.

CHAPTER I.

RELEVANCY AND PROVINCE OF JUDGE AND JURY.

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| § 7. Relevancy of evidence. | § 10. Collateral facts bearing on character. |
| 8. Collateral facts, how far admissible. | 11. Province of judge and jury. |
| 9. Evidence of intention, motive, good faith, etc., when relevant. | 12. Blended questions of law and fact. |
| | 13. Preliminary facts bearing on admissibility. |

§ 7. **Relevancy of evidence.**—The word “relevant” means that the fact to which it is applied is so related to another fact that, according to the common course of events, either, by itself or in connection with other facts, proves or renders probable the existence or non-existence, past, present or future, of the other.¹

The logical connection of the fact proven with the fact in issue constitutes the basis for all rules bearing upon relevancy; and while it is important to appropriate some particular word to point out this principle, it is useful to endeavor to differentiate certain terms frequently but erroneously regarded as synonymous with it.

Thus the terms “competent” and “admissible,”² “proper” and “competent,”³ “admissible” or “material” and “relevant,” are used interchangeably, little, if any, distinction being made in their various shades of meaning.

The word “competent” is correctly used in the sense of “qualified,” to signify the capacity of a person as a witness or his right to testify. On the other hand, “proper” is applicable to the character of evidence, where evidence of a particular description is necessary to prove certain kinds of facts.

“Material” is used in a double sense. It may express the amount of weight to be given to a fact approximating to rele-

¹Stephen's Digest of Evidence, Preliminary Chapter.

²West v. Bank, 20 Hun, 408.

³Blake v. People, 73 N. Y. 586.

vant in meaning, or it may be that certain facts in issue are *material*, i. e., necessary to be proved.¹

"Admissible," as commonly used, has required a rather loose and fluctuating meaning, in the majority of instances signifying "receivable" merely.

The principle of the relevancy of evidence is stated by Mr. Greenleaf in his first rule, "that evidence offered must correspond with the material and necessary allegations of the pleadings and be confined to the point in issue."²

This rule, by dispensing with proof of immaterial averments, being well designed to facilitate the labors of the jury and render litigation less expensive, should be strictly adhered to.³

In order to possess the characteristic of relevancy a fact need not always have a direct bearing upon the facts in issue; but it will be relevant though it only *tends* to prove the latter by association with others which go to form the proof required.⁴

So evidence is admissible which, though apparently not bearing directly on the facts in issue, yet, because it points

¹Lindsay v. People, 63 N. Y. 143.

²1 Greenl. on Evid., § 51.

³Montgomery Co. v. Bridge Co., 110 Pa. St. 54; Ferrari v. Murray, 152 Mass. 496; Ellen v. Lewison, 88 Cal. 253; Kennedy v. Currie, 3 Wash. St. 442; McGrew v. M. Pac. R. Co. (Mo., 1892), 19 S. W. Rep. 53; Michigan Ins. Bank v. Eldred, 143 U. S. 293; Gulf, etc. Co. v. Hepner, 83 Tex. 70; 18 S. W. Rep. 441; McDermott v. Falls Co. (Iowa, 1892), 52 N. W. Rep. 181; Weaver v. Shipley, 127 Ind. 526; Clow v. Brown (Ind., 1892), 31 N. E. Rep. 361; Branson v. Kitchenman, 148 Pa. St. 541; 24 Atl. Rep. 641; Faivre v. Daley, 93 Cal. 663; N. Chic. Ry. Co. v. Cotton, 140 Ill. 486; 29 N. E. Rep. 899; Freeman v. Fogg, 82 Me. 408.

⁴Bohrer v. Stumpf, 31 Ill. App. 139; Sanders v. Stokes, 30 Ala. 432;

Schuchardt v. Allens, 1 Wall. (U. S.) 359; Willoughby v. Dewey, 54 Ill. 266; Bibb v. Allen, 149 U. S. 481; Hilton v. Railroad Co. (Ala., 1893), 12 S. Rep. 276; Grantier v. Austin, 66 Hun, 157; Columbus, etc. Co. v. Semmes, 27 Ga. 283; Tucker v. Peaslee, 36 N. H. 157; Huntington v. Attrill, 118 N. Y. 365; Johnson v. State, 18 Tex. App. 385; West v. State, 76 Ala. 98; Overman v. State, 49 Ark. 364; Davis v. State, 74 Ga. 869; Watt v. People (Ill.), 18 N. E. Rep. 340; Schulser v. State, 29 Ind. 394; Com. v. Robinson, 146 Mass. 571; State v. Johnson, 37 Minn. 493; Casey v. State, 20 Neb. 138; State v. Harrison, 5 Jones' (N. C.) L. 115; Henry v. State, 11 Humph. (Tenn.) 224; Truesdell v. Hoyle, 39 Ill. App. 532; Dean v. Com., 32 Gratt. (Va.) 912; Leonard v. Territory, 2 Wash. Ter. 381.

out the manner in which the case is being conducted by either party, is relevant as tending to prove or disprove the truth or probability of the facts in issue.

No legal presumption generally arises from the mere non-production of certain witnesses.¹ But evidence that a witness is living who has not been produced,² or that a deposition which has been obtained is not offered,³ is relevant on behalf of either party to prove that this testimony, if offered, would have been adverse to the other. But in any case the inference is for the jury; while such evidence is only relevant if, in the opinion of the judge, such an inference may with fairness be drawn⁴ by reasonable men.

The relevancy of evidence need not be shown when it is offered⁵ if it is made to appear to the satisfaction of the court that counsel will subsequently produce other evidence which will render it relevant.⁶ So if evidence is rejected because irrelevant, and proof is afterwards given showing its relevancy, it may again be offered.⁷

Evidence which would be relevant in rebuttal may, in the discretion of the court, be admitted in chief.⁸ But an offer of evidence must be so explicit that the court may see whether or not it is relevant.⁹

¹ Showman v. Lee, 86 Mich. 556; Rep. 1037; Tams v. Bullix, 35 Pa. Com. v. Mahan, 142 Pa. St. 413. St. 308; Comstock v. Smith, 20 Mich. 338.

² Lynch v. Peabody, 137 Mass. 93. Evidence to explain the absence of a witness is always relevant under such circumstances. Richmond, etc. Co. v. Garner (Ga., 1893), 16 S. E. Rep. 110; Staffords v. Morning Journal, 68 Hun, 467; So. Pac. R. Co. v. Rauh, 1 C. C. A. 416.

³ Learned v. Hall, 133 Mass. 417.

⁴ See § 25.

⁵ Harris v. Holmes, 30 Vt. 352.

⁶ Harris v. Holmes, 30 Vt. 352; Com. v. Dam, 107 Mass. 210; Consaul v. Sheldon, 35 Neb. 247; Lee Silv. Co. v. Englebach (Colo., 1893), 31 Pac. Rep. 771; Morris v. Morton's Ex'rs (Kan., 1892), 20 S. W. Rep. 287; McCleneghan v. Reid (Neb., 1893), 51 N. W.

⁷ Jones v. St. Louis, etc. Co. (Ark., 1890), 13 S. W. Rep. 416. But in prosecutions for crime it is generally required that the *corpus delicti* should be shown first. People v. Millard, 53 Mich. 63.

⁸ Easley v. M. Pac. Ry. Co. (Mo., 1893), 20 S. W. Rep. 1073; Lamance v. Byrnes, 17 Nev. 197; Kansas City R. Co. v. McDonald, 51 Fed. Rep. 178; Cashman v. Harrison, 90 Cal. 297.

⁹ Wolford v. Farnham, 47 Minn. 95; Lanter v. Simpson, 2 Ind. App. 293; Alexander v. Thompson, 42 Minn. 498; Idaho, etc. Co. v. Bradbury, 132 U. S. 509; Kennedy v. Currie, 3 Wash. St. 442.

§ 8. Collateral facts, how far admissible.—This rule of relevancy does not permit the introduction of wholly collateral facts which are not part of the same transaction and throw no light upon the truth or even the probability of the fact in issue, but which, if they were introduced in evidence, would only distract and confuse the minds of the members of the jury by withdrawing their attention from the main point in issue.¹

The question whether a fact is or is not too remote, and consequently irrelevant, is a preliminary question for the judge, and on this subject no rule can be laid down further than the very general one which in practice is of little value and which is implied in the definition of the word relevant itself.

If the collateral fact introduces or will explain a fact in issue² or a relevant fact, or will rebut or support any inference which may be drawn by the jury from a fact which is in issue or from a relevant fact, it is admissible.³ In every case great care is demanded of the judge, that by the employment of a wise discrimination he may admit as relevant all evidence which sheds any light upon the issue, though weak and uncertain, rejecting that which by its remoteness cannot be connected with the facts.⁴ Thus, where the value of land is involved, evidence of recent sales of land under similar conditions in the neighborhood is relevant to show the value of the land in question.⁵ Evidence to show that the sales of land which have been proved were made under different cir-

¹ 1 Greenl. on Evid., § 52.

² Truesdale v. Hoyle, 39 Ill. App. 532; Clarke v. Van Court, 51 Neb. 756.

³ Butler v. Cornell (Ill., 1893), 35 N. E. Rep. 767; Wallace v. Kennedy, 47 N. J. L. 246; Reeve v. Dennett, 145 Mass. 23; Collins v. Glass, 46 Mo. App. 297.

⁴ Davis v. Getchell, 32 Neb. 792; Cadwallader v. Zeh, 14 S. Ct. 288 (U. S., 1894); Bransen v. Kitchenman, 148 Pa. St. 541; 24 Atl. Rep. 61; McCulloch v. Dobson, 30 N. E. Rep. 641; 133 N. Y. 114; Faivre v. Daily, 93 Cal. 664; Lanter v. Simpson, 2 Ind. App. 273; North Chi. S. R. Co. v.

Cotton, 140 Ill. 486; 29 N. E. Rep. 899. If the relevancy of a fact depends upon the proof of another fact upon which the evidence is contradictory, the proper course is to submit the proof of both facts to the jury. Day v. Sharp, 4 Whart. 339.

⁵ Huntington v. Attrill, 118 N. Y. 365; Miller v. Windsor W. Co., 30 W. N. C. 85; Prov. etc. Co. v. Worcester, 29 N. E. Rep. 56; 155 Mass. 35; Chicago, etc. Co. v. Emery (Kan., 1893), 32 Pac. Rep. 631; Cross v. Wilkins, 43 N. H. 332; Sanford v. Peck (Conn., 1894), 27 Atl. Rep. 1057; Melvin v. Bullard, 35 Vt. 368; Atchison

cumstances is then relevant. Thus the land-owner whose property is to be taken in condemnation proceedings may show that his land is of a superior quality.¹ So, also, if the situation and condition of the land sold, which is used as a standard of comparison, be not substantially identical with the land in dispute, or if the sales were not recent in point of time, it may become a question for the exercise of judicial discretion whether such evidence should not be rejected as remote and hence irrelevant.²

Under the rule above pointed out, evidence of collateral facts is sometimes held to be admissible where the fact in issue is the character of the result of a certain continued course of action which it is alleged evinces such a lack of care or skill on the part of the actor as to constitute negligence. So where the question hinges upon the proper performance of official or private duty in providing or caring for public structures or private buildings, or for machinery, or any material or mechanical device requiring the exercise of personal care and diligence, evidence of its condition, or of accidents which occurred in its use, prior to the time when the fact in issue occurred, is admissible.³ The decisions, however, are not harmonious on this point, and the cases in which such evidence has been excluded as irrelevant are extremely numerous.⁴

Where the issue involves negligence caused by the alleged defective condition of a highway, evidence showing its con-

R. R. Co. v. Harper, 19 Kan. 529; McCullough v. Dobson, 133 N. Y. 114; Howe v. Howard, 33 N. E. Rep. 528; 114; House v. Metcalf, 27 Conn. 632; Travis v. Pierson, 43 Ill. App. 479; Glasier v. Hebron, 62 Hun, 137;

¹ Chicago, K. & W. R. Co. v. Emery (Kan., 1893), 32 Pac. Rep. 631. Toledo, etc. Co. v. Milligan, 2 Ind. App. 578; Chicago v. Powers, 42 Ill. 169; Presly v. Grand T. Ry. Co. (N. H., 1892), 22 Atl. Rep. 554; Indianapolis Ry. v. Boetcher, 131 Ind. 82; 23 N. E. Rep. 551; Augusta v. Hafers, 61 Ga. 48; Topeka v. Sherwood, 39 Kan. 690; Goshen v. England, 119 Ind. 368; Magee v. Troy, 1 N. Y. S. 24; Masters v. Troy, 50 Hun, 485.

² May v. Boston (Mass., 1893), 33 N. E. Rep. 902; Packard v. Bergen Neck R. Co., 54 N. J. L. 533; Laing v. United N. J. R. & Can. Co., 54 id. 576; Seattle, etc. Co. v. Gilchrist, 4 Wash. St. 509.

³ Legg v. Bloomington, 40 Ill. App. 185; Mixer Coal Co. v. Smith, 152 Pa. St. 395; Chicago, etc. Co. v. Lewis (Ill., 1893), 33 N. E. Rep. 960; Ohio Val. Ry. Co. v. Watson's Adm'r (Ky., 1893), 21 S. W. Rep. 244; Darling v. Westmoreland, 53 N. H. 401; ⁴ Fordyce v. Withers, 1 Tex. Civ. App. 540; Baxter v. Doe, 142 Mass. 558; Early v. Lake Shore, etc. Co., 30 Am. & Eng. R. Cas. 163; Smith v. Railroad Co., 25 id. 546; Wise v.

dition, and the existence of defects in it at a short distance from the place in issue,¹ or evidence which shows the condition of the road at the point where the accident occurred a short time before or after, is relevant.² The test of relevancy in all such cases, and the principle upon which the decisions may perhaps be reconciled, is the proximity in time or place of the facts testified to, whether they relate to the condition of the highway or other object causing damage or to repairs to it. If the evidence, whether before or after, is too remote in point of time or place, it should be rejected.³ And evidence that defendant, after the accident, repaired the place where plaintiff was injured is generally irrelevant and inadmissible.⁴

Upon the question whether, in an action alleging the negligence of defendant, evidence that he is a man of careful and prudent demeanor in that line of activity in which he is alleged to have been negligent is admissible, the authorities are divided. By some of the cases it is held that evidence is relevant to show that he is competent and skilful and that no similar accident had ever before happened.⁵ The contrary proposition has also been held.⁶

Ackerman, 51 Md. 937; 26 Atl. Rep. 424; *Hudson v. Chicago Ry. Co.*, 59 Iowa, 581; *Hatt v. Nay*, 144 Mass. 186; *North Chicago, etc. Co. v. Hudson*, 44 Ill. App. 60; *State v. Raymond*, 29 Pac. Rep. 732. Where negligence is alleged, evidence that no accident of the nature of that alleged has ever before occurred is irrelevant. *Lewis v. Smith*, 107 Mass. 334.

¹ *Woodcock v. Worcester*, 138 Mass. 268; *Bailey v. Trumbull*, 31 Conn. 581; *Propson v. Leatham*, 80 Wis. 608; *Leonard v. So. P. Ry. Co.*, 21 Oreg. 555; *Haley v. Jump River L. Co.* (Wis., 1892), 51 N. W. Rep. 321. *Contra*, *Standard Oil Co. v. Tierney* (Ky., 1892), 17 S. W. Rep. 1025; *For-dyce v. Chaney* (Texas, 1893), 21 S. W. Rep. 181; *Thompson v. Railroad Co.*, 91 Mich. 255; 57 N. W. Rep. 995.

² *Salladay v. Dodgeville* (Wis., 1893), 55 N. W. Rep. 696.

³ *Skattowe v. Railway Co.*, 22 Oreg. 430; 30 Pac. Rep. 222; *Mahaney v. Railway Co.*, 108 Mo. 191; 18 S. W. Rep. 895; *Walker v. Westfield*, 39 Vt. 246; *White v. Graves*, 107 Mass. 325; *Sherman v. Kortright*, 52 Barb. (N. Y.) 267.

⁴ *Schulte v. Cunningham*, 14 Daly, 404; *Hodges v. Percival*, 152 Ill. 53; 23 N. E. Rep. 423; *Lang v. Sanger*, 76 Wis. 71; 44 N. W. Rep. 1085; *Terre Haute R. Co. v. Clem*, 123 Ind. 15; 23 N. E. Rep. 965.

⁵ *Toledo, St. L. etc. Co. v. Bailey* (Ill., 1893), 33 N. E. Rep. 1089; *International, etc. Co. v. Kuehn* (Tex., 1893), 21 S. W. Rep. 58; *Railway Co. v. Selby*, 47 Ind. 471; *Chicago, etc. Co. v. Spelker* (Ind., 1893), 33 N. E. Rep. 280.

⁶ *Ft. Worth, etc. Co. v. Thompson* (Tex., 1893), 21 S. W. Rep. 137; *Christensen v. Union Trunk Line* (Wash., 1893), 32 Pac. Rep. 1018.

So, generally, collateral facts are relevant where they show the situation or condition of the parties,¹ or identify them,² or explain the reason or motive that led to a relevant act,³ fix the time or place of a relevant action⁴ or show an opportunity for its commission.⁵

§ 9. Evidence of intention, motive, good faith, etc., when relevant.—Evidence of facts which are seemingly collateral, and which at first glance appear to have no relevancy to the issue or direct connection with it, is receivable in many cases where the party's intent, knowledge or good faith is a material element of a transaction which is proved *aliunde*.⁶ Thus, proof of the possession or of the utterance of forged documents at any time is relevant on the trial of one accused of forgery for the purpose of showing the guilty knowledge or intent of the accused.⁷

¹ Woodward v. Buchanan, 5 Q. B. 285; Mobile, etc. Co. v. Worthington (Ala., 1893), 10 S. Rep. 839; Schuman v. Expert (Mich., 1893), 51 N. W. Rep. 198; Berry v. Kowatsky (Cal., 1893), 30 Pac. Rep. 202; Long v. Straus (Ind., 1890), 24 N. E. Rep. 664; Bohrer v. Stump, 31 Ill. App. 139; Com. v. Campbell, 155 Mass. 127.

² James v. Ford, 9 N. Y. S. 127; Edmansen v. Andrews, 35 Ill. App. 223; McLane v. State, 30 Tex. App. 482; Com. v. Campbell, 155 Mass. 127.

³ Bruner v. Wade (Iowa, 1892), 51 N. W. Rep. 251; Weinberg v. Kram, 17 N. Y. S. 535; Miller v. State, 68 Miss. 221; Johnson v. State, 29 Tex. App. 150; State v. Hulse, 106 Mo. 41; State v. Lentz, 45 Minn. 377. "The possibility of error goes to the weight of evidence and is not a ground for rejecting it. The spirit of the law permits a resort to every reasonable source of information upon a disputed question of fact. Unless excluded by some positive exception, everything relative to the issue is admissible, and this is extended to every

hypothesis pertinent to the issue." Bell v. Brewster, 44 Ohio St. 696, 697.

⁴ Rollins v. Clement, 25 S. C. 601; Martin v. Victor, etc. Co., 19 Nev. 180; Orr Water Ditch, etc. Co. v. Jones, 19 Nev. 60; Beakes v. Da Cunha, 12 N. Y. S. 551; 58 Hun, 609; 27 N. E. Rep. 251. Evidence of events or acts which are clearly remembered, or which are notorious, is always relevant to fix the date of a relevant fact which has been forgotten. Ritter v. First Nat. Bank, 30 Mo. App. 652.

⁵ State v. Stubbs (N. C., 1892), 13 S. E. Rep. 90; Engle v. Smith (Mich., 1892), 46 N. W. Rep. 21; Dowell v. Guthrie, 99 Mo. 653; McCoy v. Tucks, 121 Ind. 292; Tabor v. N. Y. E. R. Co., 58 N. Y. Super. Ct. 579; McCulloch v. Dobson, 133 N. Y. 114; State v. Lentz, 45 Minn. 177.

⁶ See § 8.

⁷ State v. Minton (Mo., 1893), 22 S. W. Rep. 808; Bridge v. Eggleston, 14 Mass. 245; Com. v. White, 145 Mass. 392; Bottomley v. United States, 1 Story, 143, 144; Devere v. State, 5 Ohio Cir. Ct. 509; Smith v. State (Fla., 1892), 10 S. Rep. 894;

It may be well to remark in this place that the general rule is that facts which are distinct from the fact in issue, but which may resemble it in character, are not relevant to prove or show the probability of the fact in issue. So no one is presumed to be guilty of crime because he has committed similar though distinct crimes at some other time.¹

In civil cases the rule is often relaxed to let in seemingly irrelevant facts to strengthen the probability² of some doubtful fact by showing to the jury that the doubtful fact alleged might have happened, because under circumstances somewhat similar, if not identical, a similar fact actually did happen.³

In criminal cases the rule excluding evidence of transactions not specifically connected with the fact in issue is very strictly observed. Still it has been held that evidence of other distinct crimes is relevant, not for the purpose of proving directly the act for which the prisoner is on trial, but, that act or transaction being shown by other evidence, evidence of a similar crime will be received as showing or tending to show that the act was done with a criminal intent on the part of the accused.⁴

Com. v. Russell (Mass., 1892), 30 N. E. Rep. 763. Evidence that defendant was seen to practice writing the name forged is also relevant. Insurance Co. v. Phila. Ry. Co., 11 Pa. Co. Ct. Rep. 482.

¹People v. O'Brien, 96 Cal. 171; Com. v. Saulsbury, 152 Pa. St. 554; Nixon v. State, 31 Tex. Crim. App. 205; People v. Drake, 65 Hun, 331; State v. Bronson, 49 Kan. 758; State v. Sterrett, 71 Iowa, 386. Cf. State v. Martin, 74 Mo. 547; People v. Rogers, 71 Cal. 565; Kernan v. State, 65 Md. 253. "Proof of a general disposition to do a thing is not proof of that thing. Thus, proof of a habit of gambling when drunk is not proof that the person gambled *when drunk on a particular day*. Nor will proof of a habit of loaning money at usurious interest prove that a loan was made in a particular instance." Thompson v. Bowie, 4 Wall. 471.

²"If the evidence relates to the transaction under consideration, or is connected with it and is not too remote, it is competent. It is relevant to put in evidence any circumstance that tends to make the proposition at issue more or less improbable." Fee v. Taylor, 83 Ky. 264.

³Dwyer v. Bassett, 1 Tex. Civ. App. 513. *Contra*, Hartman v. Evans (W. Va., 1894), 18 S. E. Rep. 810; Palmer v. Hamilton (Ky., 1894), 24 S. W. Rep. 613.

⁴Copperman v. People, 56 N. Y. 591; People v. Mead, 50 Mich. 228; State v. Myers, 82 Mo. 558; People v. Gibbs, 93 N. Y. 473; Kramer v. Com., 87 Pa. St. 299; State v. Stice (Iowa, 1893), 55 N. W. Rep. 17; Card v. State, 109 Ind. 420; Brown v. State, 26 Ohio St. 176; State v. Porter (La., 1893), 12 S. Rep. 832; State v. Place, 32 Pac. Rep. 736; 5 Wash. St. 773; Courtney v. State (Ind., 1893), 32 N. E.

The fact of adultery can seldom be proven by direct evidence. For this reason proof of acts of adultery prior or subsequent to the act charged,¹ or that the accused associated with prostitutes,² is admissible to show the adulterous disposition and opportunity to commit the offense.³

If the intent or good faith of a person is in issue in a civil action, similar acts to those which are alleged may be proven to show the mental state or intention — as, for example, in cases of fraudulent misrepresentations.⁴

The practice of permitting proof of acts or crimes of a similar nature tending to prove knowledge or intention is doubtless partly due to the rule of the common law by which the party was debarred, because of interest, from testifying in his own behalf. This rule being now almost universally abrogated, a party may be called to testify to his intention⁵ in doing a particular act, and such evidence, though perhaps suspicious because of interest, is relevant and may be taken by the jury for what it is worth.⁶

Rep. 335; *Mason v. State*, 20 S. W. Rep. 564; 31 Tex. Crim. App. 306; *Strong v. State* (Tex., 1893), 22 S. W. Rep. 680; *State v. Winton* (Mo., 1893), 22 S. W. Rep. 808; *State v. Crawford* (S. C., 1893), 17 S. E. Rep. 799; *Com. v. Shepherd*, 2 Pa. Dist. Rep. 345; *Smith v. State*, 29 Fla. 108; *Com. v. Russell*, 126 Mass. 196. "Where guilty knowledge is an ingredient of a crime, evidence of the commission of other kindred offenses about the same time is admissible as tending to prove that ingredient. Many cases of fraud require the application of the same principle, as fraud involves intent, and intent can be deduced only from a variety of circumstances. Collateral facts, each insufficient in itself, whose joint operation tends to support the charge or to disprove it, are then receivable." *United States v. Clapboards*, 4 Cliff. 303-5.

¹ *Garner v. State*, 28 Fla. 113.

² *Ciocci v. Ciocci*, 29 L. T. Pr. & M. 60.

³ *State v. Henderson* (Iowa, 1892), 50 N. W. Rep. 758; *Burnett v. State*, 22 S. W. Rep. 47; *Owens v. State*, 10 S. Rep. 669; 94 Ala. 97; *Thayer v. Thayer*, 101 Mass. 111; *Com. v. Curtis*, 97 Mass. 574.

⁴ *Continental Ins. Co. v. Insurance Co.*, 51 Fed. Rep. 884; *Kelley v. Owens* (Cal., 1893), 30 Pac. Rep. 596; *McCasker v. Enright*, 64 Vt. 488; *James v. Work*, 24 N. Y. S. 147; *Dwyer v. Bassett*, 21 S. W. Rep. 621; 1 Tex. Civ. App. 513; *Lawlor v. Fritcher*, 54 Hun, 586. *Contra*, *McKay v. Russell*, 3 Wash. St. 378. The acts must, it seems, be recent. *Wright v. Wright*, 139 Mass. 177.

⁵ *People v. Baker*, 96 N. Y. 340; *White v. State*, 53 Ind. 595. A witness cannot be permitted to testify that another person intended to do a certain act. *Kenyon v. Luther*, 4 N. Y. S. 498; 10 id. 951; *Cihak v. Kleke*, 117 Ill. 643.

⁶ *Gardom v. Woodward*, 44 Kan. 758; *Stearns v. Gosselin*, 58 Vt. 38;

The competency of the party as a witness has, on the other hand, rendered proof of surrounding circumstances to show knowledge, motive or intention by inference much more important than formerly, in view of the tendency of an interested party to color the facts in his own favor. Evidence of circumstances is relevant in every instance to show the presence of a motive or of good or bad faith, or to prove that a party made preparations, *i. e.*, intended to do any act which is itself relevant.¹ So in prosecutions for crime the purchase or collecting of murderous instruments or burglarious tools, the going to the place of the crime, the disguising of oneself, and on a trial for arson the prior insurance of the property, are relevant facts.² So evidence of the behavior of a party subsequent to an act is relevant to show that his behavior is such as would be natural under the supposition that the act had been committed.³ Thus, in a criminal trial, evidence that the accused had attempted to escape,⁴ or was in possession of tools to effect an escape,⁵ or was living under an assumed name,⁶ or that he told a falsehood in denying the crime,⁷ is relevant. But the mere fact that defendant left the county is not relevant unless it appears that he did so to avoid arrest.⁸ Nor can it be shown that defendant offered to surrender himself to the authorities.⁹

In the trial of an indictment for murder the prosecution may introduce evidence of the former altercations, previous threats and menacing declarations of the prisoner against the deceased, to show the former's malice, or, if long prior to the killing, to show his premeditation — such evidence being rele-

Jefferds v. Alvord, 151 Mass. 95;
Wilson v. Clark (Ind., 1892), 27 N. E.
Rep. 310.

¹ State v. Brown, 75 Me. 456; Creswell v. State, 14 Tex. App. 1; Aaron v. State, 31 Ga. 167; Ten Eyck v. Witbeck, 69 Hun, 450; McCarthy v. Gallagher, 4 Misc. Rep. 188; Com. v. Hudson, 97 Mass. 565; Kelsoe v. State, 47 Ala. 573; Garber v. State, 4 Cold. (Tenn.) 161, 165; Foster v. Dickinson, 64 Vt. 233; 24 Atl. Rep. 253.

² Whart. Cr. Ev., § 753.

³ Banfield v. Whipple, 10 Allen, 29;
Furnis v. Durgin, 119 Mass. 500.

⁴ State v. Palmer, 65 N. H. 216;
Baker v. Com. (Ky., 1892), 17 S. W. Rep. 625; Ryan v. State, 84 Wis. 368; Com. v. McMahon, 145 Pa. St. 413.

⁵ State v. Duncan (Mo., 1893), 22 S. W. Rep. 699.

⁶ State v. Whitson, 111 N. C. 695.

⁷ State v. Bradley, 64 Vt. 466.

⁸ State v. Marshall (Mo., 1893), 22 S. W. Rep. 45.

⁹ State v. Johnston, 94 Ala. 35; People v. Rathbun, 21 Wend. (N. Y.) 518 (refusal to escape irrelevant).

vant to show the prisoner's mental state.¹ And in a prosecution for homicide, evidence that after the homicide the accused was nervous, excited² or preoccupied,³ or was silent when accused of the crime,⁴ or manifested a lack of feeling at the death of deceased where great sorrow would naturally be expected,⁵ is relevant.

§ 10. Collateral facts bearing on character.—Evidence of the general character or reputation of the parties is always irrelevant in civil causes, except in cases where general character is involved in the issue on account of the peculiar nature of the cause of action.⁶ Even where the character for chastity of a wife or daughter is concerned, in an action brought to recover for her seduction, evidence of her general moral character is inadmissible, though evidence of facts tending to prove her previous chastity or lack thereof is relevant,⁷ provided they occurred prior to the offense charged.⁸ In a

¹Harrison v. State, 79 Ala. 29; State v. Bradley, 64 Vt. 466; Hardy v. State, 31 Tex. C. Rep. 289; Pitman v. State, 22 Ark. 354; State v. Hoyt, 47 Conn. 518; State v. Green, 1 Houst. Cr. Cas. (Del.) 217; Dixon v. State, 13 Fla. 636; Everett v. State, 62 Ga. 65; State v. Walsh, 44 La. Ann. 1122; Goodwin v. State, 96 Ind. 550; State v. McCahill, 72 Iowa, 111; Reily v. Com. (Ky., 1893), 22 S. W. Rep. 222; State v. Birdwell, 36 La. Ann. 859; Riggs v. State, 30 Miss. 635; State v. Partlow, 90 Mo. 608; State v. Hymer, 15 Nev. 49; Pittman v. State (Ga., 1893), 17 S. E. Rep. 856; State v. Rash, 12 Ired. (N. C.) L. 382; Mimms v. State, 16 Ohio St. 221; Hopkins v. Com., 50 Pa. St. 9; May v. State (Ga., 1893), 17 S. E. Rep. 108; Wilson v. State, 30 Fla. 234; Benedict v. State, 14 Wis. 423; People v. Curtis, 52 Mich. 616; State v. Downs, 91 Mo. 19; State v. Taylor, 44 La. Ann. 783; 11 S. Rep. 132; Hall v. State, 31 Tex. C. Rep. 565.

²State v. Baldwin, 36 Kan. 1; Miller v. State, 18 Tex. 232.

³Noftsingher v. State, 7 Tex. App. 301.

⁴State v. Reed, 62 Me. 129.

⁵Greenfield v. People, 85 N. Y. 75.

⁶Fowler v. Insurance Co., 6 Cowen, 673, 675; Halley v. Gregg (Iowa, 1891), 48 N. W. Rep. 974; Dudley v. McCluer, 65 Mo. 241; Home Lumber Co. v. Hartman, 45 Mo. App. 647; McCarty v. Leary, 118 Mass. 509; Scruggs v. State, 15 S. W. Rep. 1074; 90 Tenn. 81; Goldsmith v. Picard, 27 Ala. 142; Porter v. Seiler, 23 Pa. St. 424; Corning v. Corning, 6 N. Y. 97; Thompson v. Brown, 4 Wall. 471; Leary v. Leary, 18 Ga. 696; Wright v. McKee, 37 Vt. 161. See 1 Greenl. on Evid., § 54.

⁷State v. Curran, 51 Iowa, 112; Badder v. Kiefer, 91 Mich. 611; 52 N. W. Rep. 60; State v. Eckler, 106 Mo. 585; Showalter v. Bergman, 23 N. E. Rep. 686.

⁸Clifton v. Granger (Iowa, 1893), 53 N. W. Rep. 316; Hallock v. Kinney (Mich., 1892), 51 N. W. Rep. 706. Evidence of plaintiff's adultery with others than defendant is irrelevant. Morris v. State, 31 Tex. App. 597.

criminal prosecution for rape or for an indecent assault, the prior chastity of the prosecuting witness is a material fact, and evidence of previous acts of unchastity, committed with the accused but with no other man, is relevant.¹ But evidence that the prosecuting witness had a bad reputation for chastity or was unchaste is irrelevant.²

Whether or not an allegation of fraud in a civil action to recover damages for a tort puts the character of a party in issue to the extent that general evidence of good character is relevant depends more upon the nature of the action than upon the character or form of the charge of fraud. It was formerly held that where a person is charged with constructive fraud, evidence of his good character is relevant to rebut the presumption.³ This rule is limited to cases where intention is sought to be proven circumstantially, and does not apply where the allegation of fraud is merely formal, or, in other words, where from the nature of the action reputation is not actually and necessarily drawn in issue.⁴ If the plaintiff bases his cause of action upon an injury to his general reputation or character, as he does in an action to recover damages for malicious prosecution or false imprisonment, or in an action of slander or libel, his reputation becomes material in view of the alleged damage it has received. Then evidence is relevant that plaintiff's general reputation was bad prior to the alleged injury, and this fact, if proved, should be considered by the jury in mitigation of damages. It is very unlikely that a man or woman of bad reputation would receive the same injury as one of an unblemished life and high moral standing.⁵ Where a peculiar trait of character is in

¹ *State v. Cassidy* (Iowa, 1892), 52 N. W. Rep. 1; *State v. Patrick* (Mo., 1892), 17 S. W. Rep. 666; *O'Brien v. State*, 47 N. J. L. 279; *Com. v. Kendall*, 113 Mass. 210.

² *Fry v. Com.*, 82 Va. 334; *Linecum v. State*, 29 Tex. App. 328; *People v. McLean*, 71 Mich. 309.

³ 1 Greenl. on Evid., §§ 54, 55, citing *Ruan v. Perry*, 3 Caines, 120; *Fowler v. Insurance Co.*, 6 Cowen, 675; *Townsend v. Graves*, 3 Paige, 455,

456. See, *contra*, *Gough v. St. John*, 16 Wend. 646; *Pratt v. Andrew*, 4 N. Y. 493. Cf. *Porter v. Seiler*, 23 Pa. St. 324.

⁴ *Nash v. Gilkerson*, 5 S. & R. 352; *Anderson v. Long*, 10 id. 55; *Porter v. Seiler*, 23 Pa. St. 424; *Zitzer v. Merkel*, 24 Pa. St. 408; *Givens v. Bradley*, 3 Bibb, 192; *Gregory v. Thomas*, 2 id. 286, cited in 1 Greenl. on Evid., § 55.

⁵ As to malicious prosecution, see

issue, as, for example, a person's habitual disregard of his financial obligations or his skill in the management of the affairs intrusted to him, evidence of reputation bearing upon these particular personal qualifications becomes relevant.¹ But evidence of reputation is always required, and proof of particular immoral acts or any specific bad conduct cannot be relevant to show character.²

In prosecutions for crime the defendant may always give or offer evidence of his previous good character and peaceable disposition as relevant to rebut any presumption of criminal intent which may arise from the circumstances against him.³ The good character of defendant, however, cannot be attacked or impeached by the state in the first instance; but where he attempts to prove good character, evidence of his general bad character, but not of any specific or particular vicious or criminal act, becomes relevant in rebuttal.⁴

Gee v. Culver, 13 Oreg. 598; McIntire v. Levering, 148 Mass. 546; Blizzard v. Hays, 46 Ind. 166; Israel v. Brooks, 23 id. 575; Finley v. St. Louis Ref. Co., 99 Mo. 559. Libel and slander, see Insurance Co. v. Hazen, 110 Pa. St. 537; Treat v. Brown, 4 Conn. 408; Nelson v. Wallace, 48 Mo. App. 193; Sanford v. Rowley, 93 Mich. 119; Hallam v. Post, 55 Fed. Rep. 456; Morey v. Morning Journal, 123 N. Y. 207; Jones v. Duchow, 87 Cal. 109.

¹Buswell v. Trimmer, 144 Mass. 350; Monahan v. Worcester, 150 id. 440; Hatt v. Nay, 144 id. 186.

²Leonard v. Allen, 11 Cush. 241, 245; State v. Donellon, 12 La. 1292; Frazier v. Railroad, 38 Pa. St. 104; Nelson v. State (Fla., 1893), 13 S. Rep. 361.

³Hinch v. State, 25 Ga. 699; Warren v. State, 31 Tex. Cr. App. 573; Dupree v. State, 33 Ala. 380; State v. Cross, 68 Iowa, 180; Wesley v. State, 37 Miss. 327; Stephens v. People, 4 Park. Cr. Cas. (N. Y.) 396; People v. Harrison, 93 Mich. 594; Murphy v. People, 9 Colo. 435; McCarty v. Peo-

ple, 51 Ill. 231; Hall v. State, 132 Ind. 317; State v. Dumphy, 4 Minn. 438; State v. Grate, 68 Mo. 22; Warren v. Com., 37 Pa. St. 45; Walker v. State, 102 Ind. 502; State v. Parks, 109 N. C. 313; State v. Sterritte, 68 Iowa, 761; McDaniel v. State, 16 Miss. (8 Smed. & M.) 401; State v. Schlegel, 50 Kan. 225; People v. Stewart, 28 Cal. 395; People v. Mills, 94 Md. 630; State v. Moelschen, 53 Iowa, 310; People v. Garbutt, 17 Mich. 9; Thomas v. People, 67 N. Y. 218; Gibson v. State, 23 Tex. App. 414; Carr v. State (Ind., 1893), 34 N. E. Rep. 593; Cathcart v. Com., 37 Pa. St. 108; Hopps v. People, 31 Ill. 385. The rule that a defendant may introduce evidence of good character has been sometimes confined in its operation to those crimes the commission of which involves moral turpitude and not mere statutory offenses not *malum in se*. Com. v. Nagle (Mass., 1893), 32 N. E. Rep. 861.

⁴State v. Merrill, 2 Dev. (N. C.) L. 269; Spies v. People (Anarchist Case), 122 Ill. 1; Gibson v. State, 23 Tex.

In a trial for homicide, evidence that the deceased was reputed to be of a peaceable disposition is irrelevant, unless in rebuttal, where the defense alleges his quarrelsome character.¹ But evidence of the character of the deceased, to show that he was quarrelsome, turbulent and vindictive, or the reverse, is admissible in behalf of the prisoner under a plea of self-defense, but only where the evidence as to this main fact is contradictory and it is not conclusively shown that defendant was solely in fault.²

§ 11. **Province of judge and jury.**—The main question involved, so far as the evidence is concerned, where an issue of

App. 414; *State v. Ellwood*, 17 R. I. 763; *Felsenthal v. State*, 30 Tex. App. 675. "The old rule that evidence of the good character of the defendant is not to be considered unless other evidence leaves the mind in doubt has been much criticised. The weight of authority is now against it. If evidence of reputation is admissible at all, its weight should be left to be determined by the jury in connection with all the other evidence in the case. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create reasonable doubt, although without it the other evidence would be convincing." *Commonwealth v. Leonard*, 140 Mass. 470, 479.

¹ *Pound v. State*, 43 Ga. 88; *Roten v. State* (Fla., 1893), 12 S. Rep. 910; *Russell v. State*, 11 Tex. App. 288; *Thomas v. People*, 67 N. Y. 218; *State v. Hockett*, 70 Iowa, 442; *People v. Bezy*, 67 Cal. 223; *Riley v. Com.* (Ky., 1893), 22 S. W. Rep. 222; *State v. Hogue*, 6 Jones (N. C.), 381; *Chase v. State*, 46 Miss. 683; *State v. Pearce*, 15 Nev. 188; *Bowman v. Smith* (Tex., 1893), 21 S. W. Rep. 48; *Fields v. State* (Ind., 1893), 32 N. E. Rep. 780.

² *Perry v. State*, 94 Ala. 25; *West v. State*, 12 Tex. App. 640; *Bond v. State*, 12 Fla. 738; *Roten v. State*

(Fla., 1893), 12 S. Rep. 910; *State v. Graham*, 61 Iowa, 608; *Alexander v. Com.*, 105 Pa. St. 1; *Marts v. State*, 26 Ohio St. 162; *People v. Harris* (Mich., 1893), 54 N. W. Rep. 645; *State v. Downs*, 91 Mo. 19; *Smith v. State* (Tex., 1893), 20 S. W. Rep. 831; *Reiley v. Com.* (Ky., 1893), 22 S. W. Rep. 222; *State v. Mathews*, 78 N. C. 523; *State v. Pearce*, 15 Nev. 188; *Com. v. Strasser*, 153 Pa. St. 431; *Harrison v. Com.*, 79 Va. 374; *State v. Nett*, 50 Wis. 524; *State v. Taylor*, 44 La. Ann. 783; *May v. People*, 8 Colo. 210; *Drake v. State*, 75 Ga. 413; *State v. Kenion* (R. I., 1893), 26 Atl. Rep. 199. For evidence of a threat made by the victim against the accused to be admissible, it is generally but not universally held that it should have been communicated to him if he alleges that his actions were influenced by it. *People v. Scoggins*, 37 Cal. 683. But evidence of specific acts of violence is not admissible. *Campbell v. State*, 38 Ark. 498; *People v. Druse*, 103 N. Y. 655; *Nelson v. State* (Fla., 1893), 13 S. Rep. 361; *Fields v. State* (Ind., 1893), 32 N. E. Rep. 780. So where the defense is that the deceased committed suicide, evidence of his melancholy disposition is relevant. *Blackburn v. State*, 23 Ohio St. 146.

fact is tried by the court without a jury, must be its weight and sufficiency. Under such circumstances no question of admissibility can arise,—the judge in any event having to hear or read it. Of course the relevancy of the testimony is always to be considered whether the trial is by jury or not; but where a jury is present, it is the office of the judge to determine all questions of admissibility, basing his decision to a large extent upon the relevancy of the testimony offered to the point in issue.¹

The weight to be given to the evidence and the credibility of the witnesses, in all cases where upon the testimony an issue of fact appears to arise, are for the consideration of the jury alone.² “But whether there is any evidence is a question for the judge; whether it is sufficient evidence is for the jury.”³

If the evidence offered by the party upon whom the burden of proof rests is clear, distinct and uncontradicted, so that no inference need be drawn, or where only one inference can be possibly drawn by any reasonable man, and the other party offers no evidence or fails to prove one or more material points of his defense, it becomes the duty of the court to direct the jury to find a verdict in favor of the plaintiff.⁴

¹ 1 Greenl. on Evid., § 49.

² *Campbell v. State* (Tex., 1893), 18 S. W. Rep. 409; *State v. Jones*, 44 La. Ann. 1120; *State v. Plum*, 49 Kan. 679; *People v. Zornneck*, 66 Hun, 626; *State v. Mexley* (Mo., 1893), 22 S. W. Rep. 575; *Jackson v. Times*, 152 Pa. St. 406; *White v. State*, 21 Tex. App. 339; *State v. Mounts*, 106 Mo. 226; *State v. Kibling*, 63 Vt. 636; *People v. Minaugh*, 131 N. Y. 563; *Blankenship v. State*, 55 Ark. 244; *People v. Cowgill*, 93 Cal. 596; *Newberry v. State* (Fla., 1890), 8 S. Rep. 445; *Weston v. Brown* (Neb., 1890), 46 N. W. Rep. 826; *Louisville, etc. Co. v. Stommel*, 126 Ind. 35; *Henderson v. Miller*, 36 Ill. App. 232; *Stanley v. Montgomery*, 102 Ind. 102; *Davis v. Hays*, 89 Ala. 563; *Higginbotham v. Campbell*, 85 Ga. 638; *Yost v. Mensch*, 27 W. N. C. 562; *West-*

brook v. Howell, 34 Ill. App. 571; *Wessels v. Beeman*, 87 Mich. 481; *Chicago, etc. R. R. Co. v. Fisher* (Ill., 1892), 31 N. E. Rep. 406; *Didier v. Penn. Co.*, 146 Pa. St. 582; 23 Atl. Rep. 801; *Johnson v. People*, 140 Ill. 350; 29 N. E. Rep. 895; *Webster v. Fowler*, 50 N. W. Rep. 1074; 89 Mich. 303; *East Tenn. etc. Co. v. Markens*, 88 Ga. 60; *Kansas, etc. Co. v. Ryan*, 49 Kan. 1; 30 Pac. Rep. 108; *Leiber v. Chicago, M. & St. P. Co.* (Iowa, 1892), 50 N. W. Rep. 547; *Albertsen v. Terry*, 109 N. C. 8; *Williams v. Dickenson*, 28 Fla. 90; *Conde v. Wiltsie*, 131 N. Y. 647. See *post*, § 342a.

³ 1 Greenl. on Ev., § 49.

⁴ *Sauber v. Collins*, 40 Ill. App. 426; *Plano Mfg. Co. v. Parmenter*, 39 Ill. App. 270; *Wolff v. Campbell*, 110 Mo. 114; 19 S. W. Rep. 622; *Meyer v. Houck*, 52 N. W. Rep. 235;

On the other hand, where the party on whom is cast the burden of proof fails to substantiate his allegations by evidence showing that he has in law a *prima facie* cause of action, then there is no case for the jury, and it is the duty of the judge to direct a nonsuit.¹

The question of the power of the jury to determine questions of law, though much discussed, may now be considered settled.² It is a proposition of almost universal acceptance that in all cases, both civil and criminal (except where a contrary rule is laid down by some constitutional or statutory enactment),³ the power of the jury is confined to determining the issue of fact, and that the rulings of the judge on the principles and rules of law involved are to be received by them as obligatory and to be implicitly followed.⁴ The pre-

McMullen v. Carsen, 48 Kan. 263; 29 Pac. Rep. 317; Fitzgerald v. Hart, 17 S. W. Rep. 369; Gildersleeve v. Atkinson (N. M., 1892), 27 Pac. Rep. 477; Schmidt v. Garfield Nat. Bank, 19 N. Y. S. 252; 64 Hun, 298; Fox v. Spring L. Co., 89 Mich. 387; Haugen v. C. M. & St. P. Ry. Co. (S. D., 1893), 53 N. W. Rep. 769; Eisenlord v. Clum, 67 Hun, 518. See *post*, §§ 247-250.

¹ "Where the facts are undisputed their effect is for the judgment of the court. Where different minds may honestly draw different conclusions from the facts, as where care and negligence is to be inferred, the question is for the jury." Sioux City, etc. R. Co. v. Stout, 17 Wall. 663; Stillwater v. Archer, 18 N. Y. S. 888; Candelaria v. Railroad Co. (N. M., 1892), 27 Pac. Rep. 497; Leavitt v. Dodge, 61 Hun, 627; Johnson v. Ridir (Iowa, 1892), 50 N. W. Rep. 36; Rumsey v. Boutwell, 61 Hun, 165; Collins v. Burlington, etc. Co., 83 Iowa, 346; 49 N. W. Rep. 848; Central R. etc. Co. v. Ingram (Ala., 1892), 10 S. Rep. 516.

² For an outline of the discussion, see 1 Greenl. Evid., § 49.

³ See Goldman v. State (Md., 1892), 23 Atl. Rep. 1097; Blaker v. State, 29 N. E. Rep. 1077; 180 Ind. 203. By the constitution of many of the states it is expressly provided that in prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts. Latly v. Emery, 59 Hun, 237; State v. Armstrong (Mo., 1891), 16 S. W. Rep. 604; State v. Burpee (Vt., 1893), 25 Atl. Rep. 964.

⁴ People v. Lem Yon (Cal., 1893), 32 Pac. Rep. 11; Wright v. Fonda, 44 Mo. App. 634; Sherwood v. Chicago, etc. Co., 88 Mich. 108; Davenport v. Hannibal, 108 Mo. 471; 18 S. W. Rep. 1122; Richards v. Wedemeyer, 75 Md. 10; Gallon v. Van Wormer (Tex., 1893), 21 S. W. Rep. 547; Kidwell v. Carson (Tex., 1893), 22 id. 534; Harper v. Morse (Mo., 1893), 21 id. 517; Chandler v. Knott (Iowa, 1893), 53 N. W. Rep. 88; Willard v. Siegel, 47 Mo. App. 1; Chicago Ch. Co. v. Fogg, 53 Fed. Rep. 72; Elliott v. Wanamaker, 155 Pa. St. 67; Campbell v. Juimies, 3 Misc. R. 316; Simpson v. Pegram (N. C., 1893), 17 S. E. Rep. 430. As bearing upon the right of the jury to decide questions

liminary question, whether there is adequate or sufficient evidence, where evidence is given on both sides from which an inference either way may be drawn, is for the judge; and if there is such evidence, no matter how contradictory on the whole it may seem to him, it will be his duty to send the case to the jury.¹ Now the inquiry, is there fit or sufficient evidence to send the case to the jury, can only be decided by the judge by the employment and application of legal rules; and the main question is, are there any facts in evidence which, if uncontradicted or proved, would justify men of ordinary reason, intelligence and fairness in deciding in favor of plaintiff? Though the judge may be convinced that plaintiff has not proved his case, if he believes that reasonable men may entertain a different conclusion, or draw a different inference from those facts, then it is his duty to submit them to the jury; and so long as the inference drawn by the jury is fair and reasonable, it will be valid even though contrary to the conclusion which the judge may draw.² But the court in charging the jury should not assume facts as proved upon which no evidence was offered or to which the evidence is so contradictory that reasonable men may form different opinions thereon.³ Where, however, the fact is conceded by all

of law, see *Pierce's Case*, 13 N. H. 536; *State v. Hodge*, 50 N. H. 510; *Com. v. McManus*, 143 Pa. St. 64; *People v. Pine*, 2 Barb. 566; *Brown v. Com. (Va., 1890)*, 10 S. E. Rep. 745; *Com. v. Abbott*, 13 Metc. 123, 124; *Higginbotham v. Campbell*, 43 Mo. App. 176; *Cochran v. Jones*, 85 Ga. 678. The province of the court and jury is frequently defined by statute, as, for example, in Connecticut. *Morehouse v. Remsen*, 59 Conn. 392.

¹ "Strictly speaking, evidence is insufficient in law only when there is a total absence of such proof in quantity or kind as, in the particular case, a rule of law requires as essential to the establishment of the fact. Insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may

be some evidence to sustain every element of the case competent both in quality and quantity in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion." *Metropolitan R. Co. v. Moore*, 121 U. S. 567-569.

² "The jury should take the law as laid down by the court and give it full effect, but its application is for them to determine. The court may not enter their distinctive province. These are the check and balance which give to trial by jury its value." *Hickman v. Jones*, 9 Wall. (U. S.) 201-2. See *post*, § 377.

³ *Wright v. Fonda*, 44 Mo. App. 634; *Griel v. Lomax*, 94 Ala. 641; *Newton v. State (Miss., 1893)*, 12 S. Rep. 560; *Patrick v. Skoman (Colo., 1892)*, 29

parties, or, being proved, is not disputed, it is not an invasion of the province of the jury for the court to state that fact as true in its charge.¹ The jury must, in the rendition of their verdict, determine the whole issue, involving, as it may, questions of law as well as of fact. In pursuance of this duty as jurors, and having in view their oaths as such, they may disregard any and all expression of opinion on the part of the judge upon any questions of fact and decide adverse to such opinion, provided their decision is not contrary to the evidence. On the other hand it is not only the right, but the duty, of the presiding judge to instruct the jury regarding all points of law involved, and it is the duty of the jury to receive and observe these instructions and to make their verdict conform thereto. So though the weight, sufficiency and credit to be given to the evidence are exclusively a matter for the jury, the court may express its opinion as regards the character of the evidence, provided it is done in such a way that the province of the jury as triers of the issue of fact is not invaded. When, after a proper instruction as to the principles and rules of law concerned, the jury wholly disregard the evidence and the rules of law, the court may set their verdict aside as against the weight of the evidence and as not conformable to the law.²

The court may call attention to the remarks of counsel in connection with the evidence;³ may caution the jury to be slow in rejecting evidence,⁴ or may point out how the intention of a party should be proved;⁵ may call attention to the gravity of the offense with which the prisoner is charged,⁶ or define malice, or point out the fact that a criminal intent may

Pac. Rep. 21; Chicago, etc. Co. v. Remminger, 140 Ill. 334; State v. Hope, 102 Mo. 410; Hitchcock v. Thayer, 32 Neb. 477; 49 N. W. Rep. 374; St. Louis v. Trimble, 54 Ark. 354; 15 S. W. Rep. 899; Potts v. Jones, 140 Pa. St. 48; Dulaney v. St. Louis S. R. Co., 42 Mo. App. 659; Horn v. State (Tex., 1893), 13 S. Rep. 329; Townley v. Coal Co., 59 Hun, 616.

¹ Mooney v. York Iron Co., 82 Mich.

263; Taylor v. Taylor, 79 Tex. 104; Trinity, etc. Co. v. Lane, 79 id. 648; McGuire v. Railroad Co., 43 Mo. App. 354; Bragg v. Bletz, 7 D. C. 105; Long v. Milford, 137 Pa. St. 122.

² See *post*, § 377.

³ Griffin, etc. Co. v. Joannes, 80 Wis. 601.

⁴ Lyts v. Keevey, 5 Wash. St. 606.

⁵ Tyler v. Hall, 106 Mo. 313.

⁶ State v. McIntosh (S. C., 1893), 17 S. E. Rep. 446.

be inferred from circumstantial evidence,¹ or may suggest that certain evidence is uncorroborated;² may suggest possible explanations of seeming discrepancies in the evidence and show how that which is inconsistent may be reconciled;³ may state to the jury that what a party admits against his interest on the witness stand may be considered as true;⁴ may call attention to the necessity of a jury agreeing upon a verdict;⁵ may state a hypothetical case for the guidance of the jury and to emphasize more clearly the principles of law involved.⁶ But to state certain facts as testified to, ignoring all others, and to inform the jury that from those facts they have a right to draw a certain inference, is an invasion of the province of the jury.⁷ On the other hand, the law does not require the instructions on the evidence to be entirely colorless, so far as the opinion as to the credibility of evidence is concerned, if the whole case is submitted to the jury to decide on all the facts and the law is accurately stated. A mere hint of an opinion upon the evidence by the court, or his evident leaning to one party or the other, is not enough to warrant a new trial.⁸ So the court may aid the jury by recapitulating the evidence, refreshing their minds where their recollection is likely to be dim, elucidating that which is complicated and involved, and so advising them that they may be able to take a just and impartial view of all parts of the evidence in their true relations.⁹

¹ *State v. McIntosh*, *supra*.

² *People v. Rohl*, 138 N. Y. 616.

³ *York v. Maine R. Co.*, 84 N. Y. 17.

⁴ *State v. Brooks*, 99 Mo. 137; 12 S. W. Rep. 633.

⁵ *State v. Hawkins*, 18 Oreg. 476; 23 Pac. Rep. 475.

⁶ *Ohio, etc. Co. v. Kleinsmith*, 38 Ill. App. 45; *People v. Rohl*, 138 N. Y. 616; *Cobb v. Covenant Ins. Co.*, 153 Mass. 176; *Wright v. Mulvaney*, 78 Wis. 89.

⁷ *Peters v. Bourneau*, 22 Ill. App. 177; *State v. Choy*, 84 Cal. 276.

⁸ *McClain v. Com.*, 110 Pa. St. 263; 1 Atl. Rep. 45; *People v. McLean*, 184 Cal. 480; *Hurlbut v. Hurlbut*, 128 N.

Y. 420; *McGee v. Wells* (S. C., 1893), 16 S. E. Rep. 89; *Hoff v. State* (Ga., 1893), 16 S. E. Rep. 99; *State v. Crawford* (S. C., 1893), 17 S. E. Rep. 199.

⁹ "What is said by the court as to the weight of evidence is advisory, in nowise intended to fetter the exercise of the juror's independent judgment. With this limitation it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collecting its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by elimi-

§ 12. **Blended questions of law and fact.**—The rule that pure questions of law and of fact are for the solution of the judge and jury respectively is on some occasions difficult of application, because of the blending of these questions in one issue in such a manner that they are not easily susceptible of separate determination. In an action for a malicious prosecution, the question of the existence of probable cause is for the court. In other words, where the evidence is conflicting it is for the court to say what particular facts constitute probable cause, leaving it for the jury to find whether or not such facts are proved by the evidence.¹ Perhaps the most important subject concerning which the respective provinces of the judge and the jury have been discussed is that of the reasonableness of time or of a person's care or skill under certain circumstances. The correct practice in all cases where negligence is alleged is for the judge to instruct the jury upon the amount or nature of the care, diligence or skill which may be legally incumbent upon persons in the circumstances of the defendant,² leaving it for the jury to determine, in all cases where the evidence on this point is contradictory, what the circumstances were, and whether the defendant has properly exercised the required care, skill or diligence. The degree of reasonableness of the care is ordinarily defined in general terms, and the instruction amounts usually to a mere statement that negligence consists in doing or omitting to do an act which a person of ordinary care or skill would or would not do under the circumstances.³ This instruction would be

nating the true points of inquiry, by resolving the evidence, however complicated, into its simpler elements, and by showing the bearing of its several parts and their combined effects stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends upon the discretion of the judge. Without this aid, chance, mistake or caprice may determine the result." *Nudd v. Burrows*, 91 U. S. 439.

¹ *Cheever v. Sweet* (Mass., 1890), 23 N. E. Rep. 831; *Leahey v. March*, 155

Pa. St. 458; *Boogher v. Howe*, 99 Mo. 183. *Contra*, *Low v. Greenwood*, 30 Ill. App. 184; *Archibald v. McLaurin*, 21 Can. S. C. R. 588; *Sanders v. Palmer*, 55 Fed. Rep. 217.

² 1 Greenl. on Ev., § 50.

³ *Deming v. Merch. etc. Co.*, 90 Tenn. 306; *Summers v. Bergner & Eng. Co.*, 143 Pa. St. 114; *Millott v. N. Y. & N. E. R. Co.*, 19 N. Y. S. 122; *Colvin v. Peabody*, 155 Mass. 104; 29 N. E. Rep. 59; *Mullen v. Railroad Co.*, 21 N. Y. S. 101; *Murphy v. Railroad Co.*, 62 Hun, 587; *Gaynor v. Old Colony R. R.*, 100 Mass. 208; *Ly-*

correct, and it has accordingly been held that if the court instructs the jury that the commission or omission of specific or particular acts constitutes negligence, then he invades the province of the jury by drawing inferences of fact and endeavoring to force his opinions upon them.¹

§ 13. Preliminary questions of fact bearing on admissibility.—To ascertain whether evidence is admissible, certain preliminary questions of fact, often of a complex nature, must be considered, and these may, it is settled, be decided by the court unaided by the jury. Thus it is for the judge to say whether the witness is qualified to testify as an expert,² and on what subjects he may be examined;³ whether a dying declaration is inadmissible because the declarant expected to recover;⁴ and to decide upon the authenticity and proper execution of deeds and writings generally.⁵ So questions as to the voluntary nature of confessions,⁶ as to what is hearsay evidence,⁷ the admissibility of statements claimed to constitute a part of the *res gestæ*,⁸ or to be admissible as evidence of pedigree,⁹ the capacity of witnesses to testify,¹⁰ and as to the admissibility of depositions where the witness cannot be

man v. Union R. R., 114 id. 83; Johnson v. Kelleher, 155 Mass. 125; 29 N. E. Rep. 200; Nesbitt v. Greenville (Miss., 1892), 10 S. Rep. 452; Wood v. Council, 143 Pa. St. 467; Butler v. Chicago R. R. (Iowa, 1893), 54 N. W. Rep. 208; Payne v. Troy, etc. Co., 83 N. Y. 572; Hodges v. St. Louis, etc. Co., 71 Mo. 50; Shafter v. Evans, 53 Cal. 32; Savings, etc. Co. v. Phillips (Ga., 1893), 17 S. E. Rep. 82; Mason v. Atl. Av. R. R. Co., 4 Misc. R. 291; Hilton v. Ala., etc. Co., 12 S. Rep. 276; Kansas, etc. Co. v. Richardson, 25 Kan. 391. "What facts will constitute that diligence which the law requires must depend upon the circumstances of each case. The omission must be considered in relation to the business in which the person who is to exercise the care is engaged, and with reference to the persons, whether adults or children, who may be injured by the want of

care." Galveston City R. Co. v. Hewitt, 67 Tex. 478.

¹ Bridges v. North London Ry. Co., L. R. 7 H. L. 213; Avilla v. Nash, 117 Mass. 318; Philadelphia, etc. Co. v. Henrice, 92 Pa. St. 431.

² See §§ 187, 188.

³ Jones v. Tucker, 41 N. H. 546; § 187.

⁴ See *post*, §§ 100-113; Hall v. Com. (Va., 1892), 15 S. E. Rep. 517; Young v. State (Ala., 1892), 10 S. Rep. 913.

⁵ Tunstall v. Cobb, 109 N. C. 316; Collins v. Ball, 82 Tex. 259; Com. v. Coe, 115 Mass. 481. See § 130.

⁶ See *post*, § 90; State v. Carson (S. C., 1892), 15 S. E. Rep. 588.

⁷ Harter v. Hopkins, 83 Wis. 309; *post*, §§ 50-62.

⁸ *Post*, § 54 et seq.

⁹ Doe v. Davies, 10 Q. B. 314; *post*, § 53.

¹⁰ *Post*, §§ 313-317.

produced,¹ are for the court. Upon these and similar questions of fact his decision is final unless objected and excepted to at the time and submitted to an appellate court for review upon a proper bill of exceptions in which the evidence is fully set forth.² It is discretionary with the judge, however, in case the proof is not convincing, to submit the evidence on any one of these preliminary questions to the jury; and where the issue, as usually happens, is one of mingled law and fact, he is bound to advise them as to the rules of law involved which are obligatory upon them in deciding these collateral issues.³

¹ See *post*, §§ 361-363; *Omaha v. Jensen*, 52 N. W. Rep. 833; *Schindler v. Railroad Co.*, 87 Mich. 400. 22 S. W. Rep. 419; *Fleming v. Latham*, 48 Kan. 773; *Farncomb v. Stern* (Colo., 1893), 32 Pac. Rep. 612; *Jones v. Charlotte, etc.* (S. C., 1893), 17 S. E. Rep. 698; *State v. Mitchell*, 37 W. Va. 565. See *post*, §§ 366-370.

² *State v. Pike*, 49 N. H. 399; *Matson v. Frazer*, 48 Mo. App. 302; *Haines v. Sairers*, 93 Mich. 440; *Carpenter v. Willey* (Vt., 1893), 26 Atl. Rep. 488; *Wells v. Burtz* (Tex., 1893), 565. See *post*, §§ 366-370.

³ See *ante*, § 12.

CHAPTER II.

SUBSTANCE OF THE ISSUE.

<p>§ 18. Matter of substance and of essential description.</p> <p>19. Allegations of value, quantity, time, place, etc.</p> <p>20. Formal allegations.</p> <p>21. Proof of contracts.</p>	<p>§ 22. Variance in the proof of sealed instruments.</p> <p>23. Substance of the issue in criminal trials.</p> <p>24. Variance.</p>
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§ 18. Matter of substance and of essential description.—

As regards the amount of evidence which is requisite in any case, it is a general rule that it is necessary only that the substance of the issue should be proved.¹ By the rules of pleading at common law, matter which was essentially descriptive—that is, which identifies the subject-matter on which the cause of action is based—must be literally proved. Any variance, however slight, between the allegation of the facts in the pleading and their proof would be fatal. So in a suit to recover damages for false imprisonment, a failure to prove that plaintiff was acquitted on the precise day alleged is no variance if the substance of the issue—*i. e.*, the acquittal—is proved.² But where it is alleged that the plaintiff was arrested “on a charge of larceny and for stealing an ox,” and it is proved that the arrest was because plaintiff “did remove or steal one ox from said range,” the action should be dismissed because of a material variance in a matter of essential description.³

¹ 1 Greenl. on Ev., § 56; *Sommer v. Lomax* (Ind., 1893), 32 N. E. Rep. 800; *Hartsock v. Mort*, 76 Md. 281; *Vette v. Leonori*, 42 Mo. App. 217; *Ahern v. Telephone Co.* (Oreg., 1893), 33 Pac. Rep. 403; *Olds v. Marshall* (Ala., 1890), 8 S. Rep. 234.

² *Vail v. Lewis*, 4 Johns. 450; 1 Greenl. on Ev., § 56.

³ *Thompson v. Richardson* (Ala., 1893), 11 S. Rep. 723.

¹ 1 Greenl. on Ev., § 56; *Sommer v. Smith* (Cal., 1892), 27 Pac. Rep. 208; *Vette v. Leonori*, 42 Mo. App. 217; *Singleton v. O'Brien*, 125 Ind. 151; *Cahill v. Colgan* (Cal., 1893), 31 Pac. Rep. 614; *Scanlan v. Hodges*, 52 Fed. Rep. 354; *Baxter v. Chicago, R. I. & P. Ry. Co.* (Iowa, 1893), 54 N. W. Rep. 350; *Wellington v. Howard* (Ind., 1893), 31 N. E. Rep. 852; *Com'rs*

No general test can be given by which it can always be accurately determined whether a given allegation is formal or essentially descriptive. The question turns largely upon the circumstances of each case. The strict rules of common-law pleading have, however, been greatly relaxed in modern times, and an extreme particularity of proof is now often dispensed with, provided the opposite party is not surprised or prejudiced thereby.¹ Thus, proof that the plaintiff jumped from a car will sustain an allegation that he fell from one;² while a charge that he was injured by a "rocket" is sustained if it be shown that he was struck by a bomb.³

In defining matter of essential description we must first consider does the allegation narrow or limit the description of something which is necessary to the cause of action.⁴ Thus of contracts either parol or written it is said that all particulars of time, value, person, place, size and name are essentially descriptive, serving to identify the contract, and they must generally be precisely proved.⁵ So, too, the allegation of the capacity in which the plaintiff sues, or of his title, is usually descriptive and must be strictly proved.⁶ Proof of ownership must generally correspond precisely with the allegation.⁷

¹ See § 24.

² *Gulf, etc. Co. v. Johnson* (Tex., 1892), 19 S. W. Rep. 151.

³ *Colvin v. Peabody* (Mass., 1892), 29 N. E. Rep. 59. For similar cases of immaterial variance, see *Carroll v. Water Co.*, 5 Wash. St. 613; *Bevens v. Barnett* (Ark., 1893), 22 S. W. Rep. 160; *Roe v. Cutter*, 4 Wash. St. 611; *Pennsylvania Co. v. Dolan*, 32 N. E. Rep. 802; *Chicago, etc. Co. v. Smith* (Ind., 1893), 33 N. E. Rep. 241; *Parsons v. Hughes*, 62 Hun, 621; *Paris, etc. Co. v. Greiner*, 84 Tex. 443; 19 S. W. Rep. 564; *Lake Shore Ry. Co. v. Hundt*, 140 Ill. 525; *Ashman v. Flint, etc. Co.*, 90 Mich. 567; 51 N. W. Rep. 645; *Norcross v. Weldon*, 59 Vt. 50; *Struthers v. Drexel*, 7 S. Ct. 1293. Wanton negligence, when charged, must be proven strictly (*Richmond, etc. Co. v. Farmer*, 12 S. Rep. 86. Cf. *Louis-*

ville, etc. Co. v. Hurt (Ala., 1893), 13 S. Rep. 130); but an allegation that a horse "was driven at a furious rate" is mere surplusage and need not be proved. *Robbins v. Diggins* (Iowa, 1889), 43 N. W. Rep. 306. Proof that an injury was caused by a team will not sustain an allegation of injury by machinery. *McPherson v. Bridge Co.* (Oregon, 1890), 26 Pac. Rep. 560.

⁴ 1 Greenl. on Ev., § 57.

⁵ *Elting v. Dayton*, 63 Hun, 629; *Higman v. Hood*, 3 Ind. App. 456; 29 N. E. Rep. 1141; *Ternes v. Dunn*, 7 Utah, 497; 27 Pac. Rep. 692; *Brown v. Rouse*, 93 Cal. 237; *Weall v. King*, 12 East, 452; *Ferguson v. Harwood*, 7 Cranch, 408, 413. *Contra*, *Kidder v. Vandersloot*, 114 Ill. 133.

⁶ 1 Greenl. on Evid., § 57, citing *Moises v. Thornton*, 8 T. R. 303, 308.

⁷ *Galveston, etc. Co. v. Becht* (Tex.,

§ 19. **Formal allegations.**—Regarding those allegations in a pleading which are formal and technical merely, as the allegation in trover that plaintiff lost the goods, or in *assumpsit* that he promised to pay for them what they were worth,¹ or the allegation in an indictment for homicide that death was caused by some particular weapon or means,² it may be said that though by a general denial in a civil action, or by a plea of not guilty to the indictment, they are put directly in issue, they are not generally regarded as essentially descriptive and need not be precisely proved as alleged.³ In trover the substance of the issue is the conversion by the defendant, and this of course must be proved substantially as alleged. So in a trial for homicide, if the killing by the defendant be proved, the proof of the manner of the killing, so long as it agrees in substance with that alleged, is immaterial.⁴

All allegations essentially descriptive must be proved, no matter what their form, while allegations not material and having no bearing on the issue need not be proved, and may and should be regarded as surplusage, though alleged with extreme explicitness and formality. But allegations not essentially descriptive may be made so by their connection with those that are, and they must then be proved as alleged if they are not pleaded with a *videlicet*.⁵ Thus when the exact price of the goods is alleged in an action for a breach of warranty, it must be strictly proved unless alleged with a *videlicet*, when the form of the allegation would be that the sale was for a valuable consideration *videlicet*, to wit, for \$100.⁶ It should

1893), 21 S. W. Rep. 971. *Cf.* Union Stock Yards v. Gillespie, 137 U. S. 411; Chicago, etc. Co. v. Rolvink, 31 Ill. App. 596.

¹ Fairfax F. M. Co. v. Chambers (Md., 1893), 23 Atl. Rep. 1024; Mathews v. Tappan, 6 Mo. 276.

² Russell on Crimes, p. 711; Turner v. State (Ala., 1893), 12 S. Rep. 54; Thomas v. Com. (Ky., 1893), 20 S. W. Rep. 226; Hernandez v. State (Tex., 1893), 22 S. W. Rep. 972.

³ Young v. Black, 7 Cranch (U. S.), 426; 1 Greenl. on Ev., § 59.

⁴ See § 23.

⁵ 1 Greenl. on Evid., § 60. The effect of this word as used in a pleading is to show that the pleader does not undertake to prove his allegations precisely. Stephen on Pleading, 309; 1 Chitty on Pleading, 261, 262, 348. "A 'viz.' serves to give additional particulars of time or place or circumstances explanatory of previous statements made in general terms; it cannot render nugatory previous specific averments." Lewis v. Hitchcock, 10 Fed. Rep. 7.

⁶ 1 Greenl. on Evid., § 60, citing Arnfield v. Bate, 3 M. & S. 173.

not be understood that a variance may be avoided, or exact proof of material allegations dispensed with, by the use of the word *videlicet*.¹ In pleading unnecessary averments a party may sometimes, unless he plead with a *videlicet*, incur the burden of proving them precisely as laid.²

§ 20. **Allegations of value, quantity, time, place, etc.**—Among allegations which are often considered immaterial, and of which, therefore, strict proof is not required, are those of time,³ place,⁴ value, quantity and quality.⁵ So in an action to recover damages for negligence,⁶ or for an assault to the person, the details of the time and place of its occurrence are immaterial, except where, by the peculiar nature of the case, time and place are rendered essential.⁷

Averments of value, as, for example, of the amount of rent claimed to be due, or of the value of goods taken in trover, and generally of matter which is alleged solely in aggravation of damages, and which does not involve the plaintiff's right of action, need not be precisely proved.⁸ Sometimes an allegation of place may be material and require to be strictly proved. Thus, when the declaration in an action to recover damages for negligence shows that plaintiff was a passenger between stations A. and B., and the proof shows that he was a passenger from C. to D., between which stations A. and B. were located, the variance will be fatal.⁹

¹ 1 Greenl. on Evid., § 60.

² 1 Greenl. on Evid., § 60, citing *Grimwood v. Barrit*, 6 T. R. 460; *Brugnier v. United States*, 1 Dak. 9; *Twiss v. Baldwin*, 9 Conn. 292; *State v. Murphy*, 55 Vt. 549; *Panton v. Holland*, 17 Johns. 92; *Vowles v. Miller*, 3 Taunt. 137; *Gould on Pleadings*, 58, secs. 35–41.

³ *Halfin v. Winkleman*, 18 S. W. Rep. 443; *Ericksen v. Schuster*, 44 Minn. 441; *Lasater v. Van Hook*, 77 Tex. 650; *St. Louis, etc. Co. v. Evans*, 78 id. 369; *Ridenhour v. Kansas City Cable Ry. Co.*, 102 Mo. 270; *Hudson v. Hudson* (Ga., 1893), 16 S. E. Rep. 349; *Devlin v. Boyd*, 69 Hun, 328; *James v. Work*, 24 N. Y. S. 149; *Russell v. Bradley*, 47 Kan. 438; *Drown v. Forrest*, 63 Vt. 557; *First*

Nat. Bank v. Stephenson, 82 Tex. 435; *Holman v. Pleasant Grove City*, 30 Pac. Rep. 72.

⁴ *Brown v. Sullivan*, 71 Tex. 470; *St. Louis Railway Co. v. Turner*, 1 Tex. Civ. App. 625; *McCaslin v. Lake Shore R. R. Co.*, 93 Mich. 553; *Georgia, etc. Co. v. Miller* (Ga., 1893), 16 S. E. Rep. 939; *Lake Shore, etc. Co. v. Hundt* (Ill., 1892), 30 N. E. Rep. 458; *Rockford v. Hollenbeck*, 34 Ill. App. 40.

⁵ 1 Greenl. on Evid., § 61.

⁶ See notes 3 and 4, *supra*.

⁷ *Phettiplace v. N. Pac. Ry. Co.* (Wis., 1893), 54 N. W. Rep. 1092.

⁸ *Hutchins v. Adams*, 3 Greenl. 174. *Cf. Ross v. Malone* (Ala., 1892), 12 S. Rcp. 182.

⁹ *Wabash, etc. Co. v. Friedman*

§ 21. **Proof of contracts.**—A written contract, in cases not within the statute of frauds,¹ is not required to be proved unless it is set out in the pleadings.² If a contract, whether oral or written, is pleaded, it must be substantially proved as alleged, particularly as to those portions by which an obligation is created, including all circumstances relating to consideration, time and mode of performance.³ Proof of an alternative or conditional contract will not support an allegation of one which is absolute;⁴ nor will proof of one that is absolute sustain an averment of one in the alternative.⁵ An allegation of an implied contract will be supported by proof of an express one,⁶ though a declaration alleging money had and received, it has been held, is not sustained by proof of a promise to pay money.⁷

The consideration, with all attendant details, should be pleaded; and where this is done, the party will be held to prove the consideration strictly as it is alleged.⁸ Accordingly, proof of an agreement to pay a fixed and definite sum will not sustain an allegation of a contract to pay merely what is reasonable.⁹

(Ill., 1892), 30 N. E. Rep. 353. See, also, *Montezuma v. Wilson* (Ga., 1889), 9 S. E. Rep. 17; *Whitney Mfg. Co. v. Richmond & D. R. Co.* (S. C., 1893), 17 S. E. Rep. 147; *Hood v. Pioneer M. & M. Co.* (Ala., 1892), 11 S. Rep. 10. A defendant is entitled to judgment if he proves one of several pleas in bar, though he fails to prove the other. *Leiter v. Day*, 35 Ill. App. 248.

¹ See *post*, §§ 261-270.

² *Hemminger v. West. Ass. Co.* (Mich., 1893), 54 N. W. Rep. 949; *Soaps v. Eiltberg*, 42 Ill. App. 375; *Hansen v. Hale*, 44 id. 474; *Hargrove v. Adcock*, 111 N. C. 166.

³ *Le Baron v. United States*, 4 Wall. 642. A writing is admissible to prove the contract alleged, though not alleged to be in writing. *Fiedler v. Stone*, 6 Cush. (Mass.) 340.

⁴ 1 Greenl. on Evid., § 58; *Saxton v. Johnson*, 14 Johns. 418; *Alexander v. Harris*, 4 Cranch, 299; *Baylies v.*

Fettyplace, 7 Mass. 325; *Lower v. Conyers*, 7 Cow. 263.

⁵ *Browning v. Berry*, 107 N. C. 231. An allegation of a joint loan is not supported by proof of a loan to one. *York v. Fortenbury*, 15 Colo. 129.

⁶ *Ashton v. Shepherd* (Ind., 1890), 22 N. E. Rep. 98.

⁷ *Clark v. Sherman*, 5 Wash. St. 681.

⁸ *Bromley v. Goff*, 75 Me. 213; *Benson v. Dean*, 40 Minn. 455; *Robinson Con. Coal Co. v. Johnson*, 22 Pac. Rep. 459.

⁹ *Cleaves v. Lord*, 3 Gray (Mass.), 66, 71. Nor is an agreement to pay money sustained by proof of a promise to deliver goods. *Titus v. Ash*, 24 N. H. 319. A landlord cannot recover for goods furnished a tenant in a suit for the rent. *Atkinson v. Cox* (Ark., 1890), 16 S. W. Rep. 124. But where a contract of hiring at a stipulated rate is alleged, plaintiff

If the consideration, though containing more than one promise, be entire, it must be proved as alleged. So a party cannot allege that he has agreed to do one thing and recover by proving that he has performed some act of a distinct character. Accordingly, proof that one agreed to finish a ship will not sustain an allegation that he promised to build one;¹ nor will proof that he delivered spruce lumber sustain a contract to deliver pine. An allegation of a note payable without defalcation or discount is not sustained by proving one payable "without defalcation."² But a plaintiff, though he cannot sue in tort and recover on contract, may recover for a wrong which is alleged and proved, though in the same action he sue on a contract which he fails to prove.³

§ 22. **Variance in the proof of sealed instruments.**—According to the rules of common-law pleading, where a deed is pleaded according to its tenor—that is, by setting out an exact copy in full—every part so stated was regarded as essentially descriptive, and it was required to be literally proved in every particular. In the absence of a statutory power of amendment, a variance was fatal.⁴ But when a deed or other instrument is pleaded according to legal effect—*i. e.*, where the purport only is set out—the same preciseness of proof is not required, and proof of a deed conforming in substance and legal effect with the allegation will suffice, though a verbal variance exists.⁵ When oyer of the deed, or its modern equivalent, the production of the deed or a copy of it in court, is claimed, the party has a right to a *verbatim* copy, though at this day, in consequence of the very liberal construction of the statutes of amendment, any discrepancy not going to the merits of the case would be disregarded.⁶

may recover the fair value of his services, though he fail to prove the rate alleged, if a promise to pay can be implied from the circumstances. *Miller v. Eldridge*, 126 Ind. 461.

¹ 1 Greenl. on Evid., § 68.

² *Addis v. Van Buskirk*, 4 Zab. 218; 1 Greenl. on Evid., § 68.

³ *Crothers v. Acock*, 43 Mo. App. 318.

⁴ 1 Greenl. on Evid., § 69, citing *Fer-*

guson v. Harwood, 7 Cranch, 408, 413; *Bowditch v. Mawley*, 1 Campb. 195; *People v. Warner*, 5 Wend. 273; *Sheehy v. Mandeville*, 7 Cranch, 208; *United States v. Le Baron*, 40 Wall. 642. See *post*, "Private writings," § 125 et seq.

⁵ *Whitlock v. Ramsey*, 2 Munf. 510; *Ankerstein v. Clarke*, 4 T. R. 616.

⁶ See *post*, § 126; *Goodbub v. Scheeler*, 3 Ind. App. 318; *Glacier Mount*

§ 23. **Substance of the issue in criminal trials.**—Whether greater strictness of proof is required in criminal than in civil proceedings in favor of life and liberty is a question upon which a diversity of opinion is found.¹ But no variance will be deemed to exist if the indictment is separable and the substance of the offense is proven, though certain averments which are not material remain unproved.² Thus, where several fraudulent misrepresentations are alleged in a prosecution for obtaining money or goods by false pretenses, it will be enough to prove a material part of them.³ So, too, it has been held that larceny may be proven on the trial of an indictment for burglary,⁴ or robbery from the person.⁵

All the circumstances of person, place or thing which are described in an indictment with extreme or unnecessary particularity must be proven strictly, where by such a course of pleading these details are essential to describe its identity to the jury. So where one is indicted for stealing a horse which is described either by color, age or brand, these averments are material, and a variance is fatal.⁶ In a prosecution for an as-

James v. Walrath, 8 Johns. 410; Silver Mining Co. v. Willis, 127 U. S. 480; Dorr v. Fenno, 12 Pick. 521; Clifford v. Mayer (Ind., 1893), 33 N. E. Rep. 127. Cf. Toledo, etc. Co. v. Harnsberger, 41 Ill. App. 494.

¹ Beech's Case, 1 Leach Cas. 158; United States v. Porter, 3 Day, 283, 286, cited 1 Greenl. on Evid., § 65, maintain that the rules of evidence are the same; but see, *contra*, 2 Russell on Crimes, 588; Roscoe's Crim. Ev. 73; United States v. Button, 2 Mason, 464; Kline v. Baker, 106 Mass. 161. See Walker v. State (Ala., 1893), 10 S. Rep. 401.

² Finney v. State, 15 S. W. Rep. 175. "Where an offense may be committed by doing any one of several things, the indictment may in a single count group them together and charge the defendant with having committed them all, and a conviction may be had of any one of those

things without proof of the commission of the others." Bork v. People, 91 N. Y. 13; State v. Gray, 29 Minn. 144.

³ People v. Haynes, 11 Wend. (N. Y.) 565; Beasley v. State, 59 Ala. 20; Com. v. Morrill, 62 Mass. 571; State v. Vorback, 66 Mo. 168; State v. Dunlop, 24 Me. 77.

⁴ Barlow v. State, 77 Ga. 448. Cf. Groves v. State, 76 Ga. 808; State v. Colclough, 31 S. C. 156; Kennegar v. State, 120 Ind. 176.

⁵ State v. Keeland, 90 Mo. 237.

⁶ Coleman v. State (Tex., 1887), 2 S. W. Rep. 859; State v. Jackson, 30 Me. 29; Wiley v. State, 74 Ga. 840; Sweat v. State, 4 Tex. App. 617; Groom v. State, 23 id. 82. When a statutory distinction is made between the species of any animal, proof of one is a variance if another species was alleged. State v. Buckles, 26 Kan. 237; Marshall v. State, 31 Tex. 471. So an allegation of stealing an

sault, its date,¹ or the locality² where it was committed, need not be precisely proved, as such facts do not constitute essential elements of the crime.³ But where place or time is material, as in a prosecution for selling liquor between specified dates,⁴ or for transporting liquors between two given points,⁵ the particulars of time and place must be precisely proved. A variance between the allegation of the name of a person and the proof, whether it be that of the person upon whom an assault was committed or of whose murder the accused stands charged, or who was the owner of the property stolen, has often been held fatal.⁶ But a mere error in spelling, or the use of a nickname, is not a variance; and if the names be *idem sonans*, or if sufficient evidence can be introduced to identify the person, an immaterial variance of name will be disregarded.⁷

animal is not supported by proof of the theft of the carcass. *Hunt v. State*, 55 Ala. 138.

¹ *Cross v. State*, 17 S. W. Rep. 1096. *Cf. People v. Formosa*, 30 N. E. Rep. 492; 131 N. Y. 478. Generally, unless time or place is an element in the nature of or is made part of the statutory description of a crime, it need not be strictly proven though alleged, provided the offense is shown to have been committed prior to the date of the indictment and within the jurisdiction. *Arcia v. State*, 28 Tex. App. 198; *State v. Dorr*, 82 Me. 212; *Jackson v. State*, 88 Ga. 787; *Clark v. State*, 16 S. E. Rep. 96; *Com. v. Riggs*, 14 Gray, 376; *Burge v. State*, 62 Ga. 170. *Contra, Callahan v. State*, 41 Tex. 439 (theft from a house); *Com. v. Lester*, 129 Mass. 101; *People v. Honeyman*, 3 Den. 121; *State v. Porter*, 10 Rich. (S. C.) 145; *Com. v. Laughlin*, 11 Cush. 598.

² *Blackwell v. State*, 30 Tex. App. 416; 17 S. W. Rep. 1061.

³ See *Com. v. Keefe*, 140 Mass. 301; *Weineck v. State* (Neb., 1892), 51 N. W. Rep. 307 (placing obstruction on railroad track).

⁴ *Com. v. Purdy*, 146 Mass. 138.

⁵ *State v. Libbey*, 84 Me. 461.

⁶ *King v. State*, 44 Ind. 285; *People v. Hughes*, 41 Cal. 234; *Underwood v. State*, 72 Ala. 220; *Henley v. Com.*, 1 Bush (Ky.), 11; *State v. Gaffery*, 12 La. Ann. 265; *State v. Taylor*, 15 Kan. 420, 514; *Humbard v. State*, 21 Tex. App. 200; *Lewis v. State* (Ga., 1893), 15 S. E. Rep. 697; *Owens v. State* (Tex., 1893), 20 S. W. Rep. 558; *Com. v. Morningstar*, 12 Pa. Co. Ct. R. 34; *Clements v. State*, 21 Tex. App. 258; *Wade v. State*, 10 S. Rep. 233; *Sykes v. People* (Ill., 1891), 23 N. E. Rep. 391.

⁷ *Kennedy v. People*, 39 N. Y. 250; *State v. Humble*, 34 Mo. App. 343; *Watzel v. State*, 28 Tex. App. 523; *Martin v. State*, 28 id. 364; *State v. Bain*, 43 Kan. 638; *State v. Flack*, 48 Kan. 146; *Young v. State*, 17 S. W. Rep. 413; 30 Tex. App. 308; *Com. v. Caponi*, 155 Mass. 534; 30 N. E. Rep. 82; *Com. v. Beckley*, 3 Metc. 330 ("Jr.," "Sr." or "Mrs." no part of a name); *State v. Best*, 12 S. E. Rep. 907; *Com. v. Gould* (Mass., 1893), 33 N. E. Rep. 656; *Rogers v. State* (Ga., 1893), 16 S. E. Rep. 205; *State v.*

The substance and essence of homicide being the felonious killing by means of shooting, cutting, etc., proof of a killing in any manner that substantially conforms to the description is sufficient, and the details or identity of the offense need not be precisely proved as alleged.¹ Thus proof of killing by shooting with a pistol will sustain an indictment for killing with a gun;² and an averment that one was killed with a bowie-knife is sufficiently sustained by proof that he was slain with a butcher-knife.³ An indictment for the larceny of chickens,⁴ a cow,⁵ or of a sheep,⁶ or horse,⁷ or hog,⁸ will be sustained by proof of the larceny of any variety or sex of those animals. But where the allegation is that bank-notes⁹ or promissory notes,¹⁰ greenbacks¹¹ or "money"¹² were stolen, the proof must correspond with the allegation, and any material variance will be fatal. But an indictment for stealing \$30 in money is sufficiently sustained by proof that three ten-dollar bills were taken.¹³ Where one is indicted for perjury in court, not only must the term of the court be strictly proved,¹⁴ but

Brin, 30 Minn. 522; *Elberson v. Richards*, 42 N. J. L. 70.

¹ "In an indictment any allegation not descriptive of the identity of the offense which can be omitted without affecting the charge, and without detriment to the complaint, may be treated as surplusage and need not be proved." *Commonwealth v. Rowell*, 146 Mass. 130.

² *Turner v. State* (Ala., 1893), 12 S. Rep. 54. Proof of strangling with a scarf is sufficient where strangling with the hands was alleged. *Thomas v. Com.* (Ky., 1893), 20 S. W. Rep. 236; *Rex v. Waters*, 7 C. & P. 250.

³ *Hernandez v. State*, 22 S. W. Rep. 972. *Cf. Com. v. Webster*, 5 Cush. 331; *Com. v. McLaughton*, 105 Mass. 460. See, also, *Rodgers v. State*, 50 Ala. 102; *Witt v. State*, 6 Cold. (Tenn.) 5; *State v. Smith*, 32 Me. 369; *State v. Lautenschlager*, 22 Minn. 514; *State v. Kilgore*, 70 Mo. 546; *State v. Fox*, 25 N. J. L. 256; *State*

v. Gould, 90 N. C. 380; *People v. Holt*, 3 Hill (N. Y.), 432; *Goodwin v. State*, 12 Miss. 520. *Cf. Guedel v. People*, 43 Ill. 226. Allegations as to place or nature of wounds are generally immaterial. *Com. v. Coy* (Mass., 1893), 32 N. E. Rep. 4; *State v. Waller*, 88 Mo. 402; *Nelson v. State*, 1 Tex. App. 41; *Bryan v. State*, 19 Fla. 364.

⁴ *State v. Bassett*, 34 La. Ann. 1108.

⁵ *Parker v. State*, 39 Ala. 365.

⁶ *McCully's Case*, 2 Lew. C. C. 272; *Reg. v. Spicer*, 1 Den. C. C. 82.

⁷ *Davis v. State*, 23 Tex. App. 210.

⁸ *State v. Gordet*, 7 Ired. (N. C.) 210.

⁹ *Pomeroy v. Com.*, 2 Va. Cas. 343.

¹⁰ *Stewart v. State*, 62 Md. 412.

¹¹ *State v. Collins*, 72 N. C. 144.

¹² *Lancaster v. State*, 9 Tex. App. 393.

¹³ *Roth v. State*, 10 Tex. App. 7.

¹⁴ *United States v. Neal*, 1 Gall. 387; *Rex v. Leefe*, 2 Campb. 134, 140.

the title of the action,¹ and the exact time of the day, must be proved with extreme particularity.²

§ 24. **Variance—Amendments.**—Variance in the law of evidence may be defined as a disagreement between an allegation in a pleading and the facts proved to support it which is of such a nature that the claim made is not supported.³

In order to determine whether a material variance exists, the essential facts and principles constituting together the proposition of law involved, and which are indispensable to show the legal right of the pleader, must be ascertained. Having arrived at a clear determination of the principles and facts, everything else is mere surplusage and may be disregarded as not needing proof.

By statute in England, and in almost all of the states of the Union, the courts are vested with power to grant amendments to the record in all cases where a variance exists between the allegations in the pleadings and the proof, on such terms as may seem reasonable to the court, provided the rights of neither party are prejudiced thereby.⁴ The party at fault will usually be required to pay the costs of the proceedings which are invalidated by the amendment.⁵ The

¹ Walker v. State (Ala., 1893), 11 S. Rep. 401. Cf. Wohlgemuth v. United States (N. M., 1893), 30 Pac. Rep. 854.

² Reg. v. Bird, 17 Cox's Cr. C. 387. As to variance in the crime of forgery, see Wilson v. State (Miss., 1893), 12 S. Rep. 332; State v. Gryder, 44 La. Ann. 962; Simms v. State (Tex., 1893), 22 S. W. Rep. 876.

³ Stephen on Pl., 107, 108; House v. Metcalf, 27 Conn. 638; Cent. R. Co. v. Hubbard, 86 Ga. 623; Dennis v. Spencer, 45 Minn. 250; Haughey v. Joyce, 41 Mo. App. 564; Richards v. Green (Ariz., 1893), 32 Pac. Rep. 266; Becker v. Baumgartner (Ill., 1893), 32 N. E. Rep. 786; Mobile, etc. Co. v. George (Ala., 1892), 10 S. Rep. 145; Atkinson v. Cox (Ark., 1892), 16 S. W. Rep. 124. "A disagreement between the allegations and the proof in some

matter which in point of law is essential to the charge or claim." Anderson's Law Dict.; House v. Metcalf, 27 Conn. 638.

⁴ Sandford Tool Co. v. Mullen (Ind., 1890), 27 N. E. Rep. 448; Dexter v. Ivins, 133 N. Y. 986; Listman v. Hickey, 65 Hun, 8; 19 N. Y. S. 880; Evarts v. United States M. Acc. Ins. Co., 61 Hun, 624; Taylor v. Arnold (Ky., 1892), 17 S. W. Rep. 361; Cain v. Cody (Cal., 1892), 29 Pac. Rep. 778; Cargain v. Everett, 62 Hun, 620; Walton v. Jones, 7 Utah, 462; 27 Pac. Rep. 580; Denham v. Bryant, 139 Mass. 110.

⁵ Bausch v. Ingersoll, 61 Hun, 627; Keeler v. Shears, 6 Wend. 540; Woods v. Durett, 28 Tex. 429; McClellan v. Osborne, 51 Me. 118. No amendment will be allowed which will add or substitute a new cause of action

power to allow amendments is wholly discretionary, and is usually not reviewable unless in the case of its manifest abuse.¹ If, however, the adverse party has been actually misled to his prejudice² in maintaining the action or defense upon its merits, the variance will be deemed material and the court will refuse permission to amend.³ The variance must be taken advantage of by specific objection clearly pointing it out at some period before final judgment that it may receive consideration before it shall have been aided by the verdict.⁴ Though contributory negligence should be specially pleaded, if the parties proceed to a trial of the issue on that point in a case where defendant does not plead it, it will be deemed waived.⁵

or a new defense (*Wilkinson v. Wilkinson*, 59 Wis. 64; *Ward v. Patton*, 75 Ala. 207; *Freeman v. Grant*, 132 N. Y. 32; *Tatham v. Ramey*, 82 Pa. St. 120; *Switzer v. Claffin*, 82 Tex. 513; *Shearer v. Middleton*, 88 Mich. 621; *White v. Mass*, 75 Ala. 207; *Carpenter v. Huffsteller*, 87 N. C. 273; *Snyder v. Harper*, 24 W. Va. 206; *Shenandoah V. R. v. Griffith*, 76 Va. 913; *Culp v. Steare*, 47 Kan. 746; *Brodeck v. Hirschfield*, 57 Vt. 12; *Galbreath v. Newton*, 45 Mo. App. 312); though usually the form of the action may be changed under the statutes allowing amendments. *Redstrake v. Insurance Co.*, 44 N. J. Eq. 294. *Cf. Moseley v. Richmond*, etc. Co., 87 Ga. 747.

¹*Brady v. Casidy*, 13 N. Y. S. 824; *Gormly v. Bringam*, 138 N. Y. 623; *Bondur v. Le Bourne*, 79 Me. 21; *Greer v. Covington* (Ky., 1887), 2 S. W. Rep. 323; *Randall v. Baird* (Mich., 1887), 33 N. W. Rep. 506.

²That a party has been prejudiced should be shown by affidavit in the trial court. *Ridenhour v. Kansas City, etc. Co.*, 102 Mo. 270.

³*Zeininger v. Schnitzler*, 48 Kan. 66; *Hall v. Roberts*, 63 Hun. 473; *Crane v. Ring*, 48 Kan. 61; *Crothers*

v. Acock, 43 Mo. App. 318; *Rozet v. Harvey*, 26 Ill. App. 558; *Robbins v. Diggins* (Iowa, 1890), 43 N. W. Rep. 306; *Northern P. etc. Co. v. O'Brien* (Wash., 1890), 21 Pac. Rep. 32; *Chewacla Works v. Dismukes*, 87 Ala. 344; *Brown v. Sullivan*, 71 Tex. 470.

⁴See *post*, § 232; *Wallich v. Morgan*, 39 Mo. App. 469; *Henry v. Dietrich*, 7 N. Y. S. 505; *Richards v. Bestor*, 90 Ala. 352; *O'Conner v. Delany* (Minn., 1893), 51 N. W. Rep. 1108; *McCormick H. Co. v. Burandt*, 26 N. E. Rep. 588; *Tallman v. Earley*, 13 N. Y. S. 805; *Tognini v. Kyle*, 17 Nev. 209; *Home Ins. Co. v. Bethel*, 42 Ill. App. 475; *Long v. Campbell*, 37 W. Va. 665. This is provided for by statute in many of the states. *Salmon Bank v. Leyser*, 22 S. W. Rep. 504. See *Brace v. Doble* (S. D., 1893), 53 N. W. Rep. 859; *Upham v. Draper* (Mass., 1893), 32 N. E. Rep. 2; *Sheppard v. Newhall*, 54 Fed. Rep. 306. Variance cannot be shown on appeal. *In re Lincoln*, 19 Fed. Rep. 460; *Wasatch Min. Co. v. Crescent Min. Co.*, 147 U. S. 293; *Perry v. Plunket*, 74 Me. 328; *Liddell v. Fisher*, 48 Mo. App. 449.

⁵*Railroad Co. v. Farmer* (Ala., 1893), 12 S. Rep. 86, 89, 432.

CHAPTER III.

PRIMARY AND SECONDARY EVIDENCE.

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| <p>§ 30. Primary and secondary evidence distinguished.</p> <p>31. Instruments required by law to be in writing.</p> <p>32. Disputed writings.</p> <p>33. Contracts and other transactions actually reduced to writing.</p> <p>34. Collateral writings.</p> | <p>§ 35. Exceptions in the case of records and appointments to office.</p> <p>36. Exceptions in the case of evidence of general results.</p> <p>37. Admissions as primary evidence.</p> <p>38. Photographs as primary evidence.</p> <p>39. Exhibition of articles in court.</p> |
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§ 30. Primary and secondary evidence distinguished.—

The rule requiring the introduction of the best evidence has reference generally to offers of oral evidence to prove the contents of a writing where the writing itself should be produced.¹ The rule does not require the production of the strongest and most convincing evidence, so that no principle of law is violated by the production of faint or weak evidence, and the withholding of that which is stronger, more cogent and convincing, so long as both are equally original.² But it is a natural inference, in the absence of explanatory circumstances, that a party who is withholding the best evidence of any fact in issue does so with a wrong motive which would be defeated by its production.³ When, therefore, evidence is produced that presupposes the existence of other evidence to the same facts of a more original character, which is

¹ 1 Greenl. on Evid., § 82.

² *Ellsworth v. Insurance Co.*, 105 N. Y. 624; *Anglo-Am. P. & P. Co. v. Cannon*, 31 Fed. Rep. 318; *Richardson v. Milburn*, 17 Md. 67; *McCreary v. Turk*, 29 Ala. 244; *Wynn v. City, etc. R. R. (Ga., 1893)*, 17 S. E. Rep. 649; *Norton v. East St. Louis*, 36 Ill. App. 371. A party is not under the necessity of calling a particular

witness upon the ground that his testimony is the best evidence if he choose to produce other evidence equally original. *N. E. Mon. Co. v. Johnson*, 144 Pa. St. 61.

³ 1 Greenl. on Evid., § 82, citing *Taylor v. Riggs*, 1 Pet. 591, 596; *Minor v. Tillotson*, 7 Pet. 100. Cf. *Reich v. Berdel*, 120 Ill. 499; 11 N. E. Rep. 912.

more immediate, and which lies closer to the facts which are in issue, the evidence produced will be regarded as substitutory, and, as such, will be rejected.

The principle by which the best evidence is demanded is the basis for the common division of evidence into primary and secondary.¹ Primary evidence of any fact may be defined as the highest or best evidence which from the nature of the fact in the abstract can be procured, and which in the circumstances of the particular case affords the greatest certainty of the fact or renders the probability of its existence most apparent to the mind. It is such evidence as does not indicate the existence of any other evidence which is less remote to the facts to be proved.² Thus the primary evidence of a written instrument is the writing itself, and unless it be shown that the party claiming thereunder, after a diligent search, is unable to produce it, no other evidence of its contents will be admitted.³ So where a letter, if producible, is primary evidence of any relevant fact, press copies of the letter are inadmissible except as secondary evidence, and after the loss or destruction of the original letter has been shown.⁴ If a writing

¹ 1 Greenl. on Evid., § 84.

² Anderson's Law Dict.

³ Trimble v. Edwards, 84 Tex. 497; 19 S. W. Rep. 772; Isley v. Boon, 109 N. C. 555; Carwin v. Morehead, 51 Iowa, 99; Henry v. Whitaker, 82 Tex. 5; Daly v. Bernstein, 28 Pac. Rep. 764; Blalock v. Miland, 87 Ga. 573; Buchanan v. Wise, 34 Neb. 695; 52 N. W. Rep. 163; Grant v. Oliver, 91 Cal. 158; Taylor on Evid. 94. "The question whether evidence is primary or secondary has reference to the nature of the case in the abstract, and not to the circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law and not of fact; referring only to the quality and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary but primary." 1 Greenl. on Evid., § 84.

⁴ King v. Worthington, 73 Ill. 161; Smith v. Brown, 151 Mass. 339; Anglo-American P. & C. Co. v. Cannon, 31 Fed. Rep. 313; Marsh v. Hand, 35 Md. 123; Goodrich v. Weston, 102 Mass. 362; Watkins v. Paine, 57 Ga. 50. See § 126. "The rule that a copy of a copy is not admissible evidence is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, it is not by the law deemed as high evidence as the original, for then it is also a second remove from the record. But it is quite a difficult question whether it applies to cases of secondary evidence where the original is lost, or the record of it is

is executed by all the parties in several parts or copy, each part is primary evidence of the writing.¹ But where a writing is executed in counterpart—that is, in duplicate—each part essentially the same as the other, but being signed by one of the parties, it is primary evidence only against the party signing it.² Where a number of copies are all made by printing, lithography, photography, or by any process which will secure exact uniformity, each is primary evidence of all the others, though when all are from a common original, none is primary evidence of that original.³ It has been held in several cases where the loss of the original and of a press copy of a letter was proved, that a copy of a copy of the original was admissible where its correctness as a copy was vouched for under oath.⁴

§ 31. Instruments required by law to be in writing.—Oral or secondary evidence is inadmissible where the law requires facts to be evidenced in writing, or where a party, to substantiate his claims or the title upon which he relies, must produce some written instrument. As examples of such writings may be instanced judicial and other public records, deeds of conveyance and contracts not to be performed within a year.⁵ The requirement that such transactions should be evidenced by writing is usually statutory, and to ascertain its effect and scope the statute will have to be consulted. If, therefore, the law demands that written proof must in any given case be produced, no oral evidence is admissible if the writing is in existence and is under the control of the party

not deemed as high evidence as the original, or when the copy of a copy is the highest proof in existence.”

Winn v. Patterson, 9 Pet. (U. S.) 677.

¹Crossman v. Crossman, 95 N. Y. 145; Hubbard v. Russell, 24 Barb. 404; Gardner v. Eberhart, 82 Ill. 316; Cleveland, etc. Co. v. Perkins, 17 Mich. 296; Dyer v. Fredericks, 63 Me. 173; State v. Gurnee, 14 Kan. 111; Weaver v. Shipley (Ind., 1891), 27 N. E. Rep. 146.

²Roe v. Davis, 7 East, 362; Anglo-Amer. P. & C. Co. v. Cannon, 31 Fed. Rep. 313; Mann v. Godbold, 3 Bing.

292; 1 Whart. Evid., § 74; Lewis v. Roberts, 103 E. C. L. 29. See Anderson's Law Dict., “Counterpart.”

³Wharton on Evid., § 92; Foote v. Bentley, 44 N. Y. 166; Memphis, etc. Co. v. Benson, 1 Pick. 627; People v. Williams, 64 Cal. 87; Ford v. Cunningham, 87 Cal. 409.

⁴Goodrich v. Weston, 102 Mass. 362; Winn v. Paterson, 9 Pet. (U. S.) 663; Gracie v. Morris, 22 Ark. 415. See, also, 1 Cush. 189; 35 Md. 123; 37 Conn. 555; 1 Whart. Evid., §§ 90-100.

⁵See *post*, §§ 261-270.

claiming under it.¹ But where a party claiming under a deed or other instrument required to be in writing can show to the satisfaction of the court that it was executed, and that it was destroyed or cannot be found after a thorough search, he may prove its contents by secondary evidence.²

The rule above outlined is chiefly applicable in the case of transactions which are required by the statute of frauds to be in writing,³ and to the proof of public records required by law to be kept.⁴ Thus, a judgment of a court,⁵ or the appointment of an official whose appointment is recorded,⁶ or the naturalization of an alien,⁷ must be shown by the production of the record or of a certified copy thereof.

In many of the states statutory provisions exist permitting any instrument acknowledged and recorded to be proved by a certified copy where the original is not procurable.⁸ Such a provision is of peculiar advantage to one who, not being a party to the deed, never had it in his custody, and hence may not be able to account for its absence;⁹ but it cannot be employed by a party to the deed where he could as easily produce the original instrument.¹⁰

¹ *Buck v. Gage*, 27 Neb. 306; *Everson v. Mayhew*, 85 Cal. 1; *Poorman v. Miller*, 44 Cal. 269; *Whitehead v. School District*, 145 Pa. St. 418; *Ney v. Mumme*, 66 Tex. 268; *Louisville, etc. Co. v. Orr* (La., 1892), 10 S. Rep. 167; *State v. Reid*, 45 La. Ann. 162; *Bode v. Trimmer*, 82 Cal. 513; *Bounds v. Little*, 79 Tex. 128.

² *Eversole v. Rankin*, 102 Mo. 488; *Bounds v. Little*, 79 Tex. 128; *Abele v. Brewster*, 58 Hun, 605. See *post*, § 130; *Nolan v. Pelham*, 77 Ga. 262; *Gayle v. Perryman* (Tex., 1894), 24 S. W. Rep. 850.

³ See *post*, § 261.

⁴ *Childrey v. Huntington*, 34 W. Va. 457; *Christman v. Phillips*, 58 Hun, 282; *Nesbit v. Bendheim*, 15 N. Y. S. 300.

⁵ See §§ 142-149.

⁶ *Boree v. McLean*, 24 Wis. 225.

⁷ *Bode v. Trimmer*, 82 Cal. 513.

Where no record can be produced to show naturalization, it may be in-

ferred from the fact that he has voted, held office and exercised the rights of citizenship. Such facts would then be relevant to show his naturalization. *Cowan v. Prowse* (Ky., 1892), 19 S. W. Rep. 407; *Boyd v. Nebraska*, 12 S. Ct. 375; 143 U. S. 135.

⁸ See *post*, §§ 134, 142c-149; *Edwards v. Osmon*, 84 Tex. 656; 19 S. W. Rep. 868; *Saders v. Giddings*, 90 Mich. 50; 51 N. W. Rep. 265; *Tevis v. Collier*, 84 Tex. 638; 19 S. W. Rep. 801. It has been held that a copy of a record made according to law must prevail over the oral testimony of a person who, on examining the record, testifies that he cannot find the part certified. *Boyce v. Auditor*, 52 N. W. Rep. 754; 90 Mich. 314.

⁹ *Frank v. Reuter*, 22 S. W. Rep. 812; *Woods v. Bonner*, 89 Tenn. 411; *Kenosha Co. v. Shedd*, 48 N. W. Rep. 933.

¹⁰ *Wilson v. Wright* (Utah, 1893), 30 Pac. Rep. 754.

§ 32. **Disputed writings.**—Where the existence of a writing material to the case or having an important bearing upon the credibility of a witness is disputed, its contents cannot be shown by the verbal testimony of witnesses. Thus where, in the case of a civil action or a criminal prosecution based upon the violation of a statute or municipal ordinance, it becomes necessary to prove the fact of the existence of the written statute or by-law, it cannot be done by verbal evidence.¹ As matter of experience it has been found that the memory is treacherous and unreliable. Aside from the temptation to commit fraud and perjury, to prevent the commission of which this rule has been adopted,² which would be always present if the terms of disputed documents were allowed to be given by oral evidence, the court has a right to see the whole document, which may, in its entirety, possess a meaning far different from that of any detached part. Where a witness is questioned on cross-examination as to the contents of a letter which it is alleged he has written, with a view to impeach him by bringing out contradictory statements contained therein, the letter must first be read to him and he must be asked if he has written it.³ In no event would it be proper to read a portion of the letter or to embody a part or all of it in an interrogatory and ask the witness if he wrote a letter to that effect.⁴ So where the witness is examined by a commission, and in reply to a question gives the contents of a letter without producing it, it will be stricken out, there being no method of obtaining the letter itself.⁵

The erroneous admission of parol evidence of a writing is cured by its subsequent production⁶ by the party claiming under it or by his adversary.⁷ A copy of an instrument may

¹ *Ex parte Canto*, 21 Tex. App. 61; *Louisville, etc. Co. v. Dulaney*, 43 Ill. App. 297. See *post*, §§ 143, 143a.

² *Anglo-Am. P. & C. Co. v. Cannon*, 31 Fed. Rep. 313; *Cornett v. Williams*, 20 Wall. 226.

³ See *post*, § 342.

⁴ See *post*, § 350.

⁵ *Beall v. Poole*, 27 Md. 245; *Com-*

stock v. Carnley, 4 Blatchf. C. C. 58; *Peck v. Parchen*, 52 Iowa, 46; *Dwyer v. Dunbar*, 5 Wall. 318; *Leese v. Clarke*, 29 Cal. 664; *Lowry v. Harris*, 12 Minn. 255.

⁶ *Linton v. Allen*, 154 Mass. 432; *Jones v. Tallant*, 90 Cal. 386; *Avery v. Starbuck*, 127 N. Y. 675.

⁷ *Glover v. Thomas*, 75 Tex. 506; *Stewart v. De Loach*, 86 Ga. 729.

be received to prove the contents of the writing upon condition that its correctness as a copy shall subsequently be made to appear. Any impropriety in the reception of such a copy is cured by proof that it is a true copy of the original.¹

§ 33. Contracts or other transactions actually reduced to writing.—Where parties to a contract have reduced their agreement to writing, the existence of the written obligation being to a certain extent the main fact in issue, the writing itself must be given in evidence, and oral evidence of its contents will not be received unless the absence of the writing is satisfactorily accounted for.² Though this rule is usually invoked in cases where rights under a written contract are sought to be enforced, it is equally applicable in the case of any writing which has expressly or by implication been agreed on by the parties as a history or record of a transaction in which either or both were interested. So where the examination of a judgment debtor in supplementary proceedings was taken in writing and signed by him, oral evidence to prove what he said is inadmissible.³

In the case of a written contract it is fair to infer that, the parties having embodied their transactions in writing, the writing will contain the final form which their dealings may have assumed, and, having given and accepted written evidence of a contractual relationship, they are compelled to

¹Kendrick v. Latham, 6 S. Rep. 871; 25 Fla. 819. After a witness has been allowed without objection to give oral evidence of the contents of a writing which he could have produced as the best evidence, any objection to a question put to him to ascertain his purpose in making it or to any relevant question comes too late.

²Lott v. King, 79 Tex. 292; Memphis, etc. Co. v. Benson, 1 Pick. 627; Penderly v. Crescent, 21 La. Ann. 410; Kleiman v. Geiselman, 45 Mo. App. 497; Lewis v. Hadmon, 56 Ala. 186; Steele v. Etheridge, 15 Minn. 501; Taussig v. Glenn, 51 Fed. Rep. 409; Stebbins v. Duncan, 108 U. S. 43. The contents of writings which are

shown to be in existence but beyond the jurisdiction may be shown by secondary evidence (Thomson-Houston El. Co. v. Palmer (Minn., 1890), 53 N. W. Rep. 1137; Tenn. etc. Co. v. Danforth (Ala., 1893), 13 S. Rep. 51; Missouri, etc. Co. v. German, 84 Tex. 141); as by a letter-press copy. Smith v. Traders' Bank, 82 Tex. 368. See *post*, §§ 126, 130, 132, 148, 149.

³Kain v. Larkin, 131 N. Y. 300. Nor can an employee of a commercial agency give oral evidence of a merchant's credit or rating where such facts are recorded in books kept for that purpose and which are easily accessible. Deere v. Bagley, 80 Iowa, 197; 45 N. W. Rep. 557.

abide by their action and are not allowed to substitute evidence of a verbal understanding in its place.¹ So it is said that here the writing is not collateral but is of the essence of the contract.²

In an action to recover rent or wages, if plaintiff relies upon a written lease or contract of hiring, he must produce it or account for its absence; for the amount due can only be properly ascertained by an examination of the terms of the contract as they are contained in the writing.³ On the other hand, where the relationship of landlord and tenant, or of master and servant, is the sole fact in issue, then, while it could be readily proved by the production of a written contract by which it was known to have been created, yet this is not indispensable.⁴

Where the facts in issue are not the relative rights and duties of the parties under the written instrument, but some fact collateral to the writing, the production of the instrument as primary evidence of that fact is not necessary, and the fact in issue may be proved by parol evidence under the rule that if such evidence is as near the fact to be proved as written evidence, then both are primary evidence of that fact.⁵ So where the contents of a telegram or letter are essential in determining the rights of the parties, it must be produced as primary evidence of those rights. But where the independent fact in issue and to be proved is only that a letter or telegram purporting to have been sent was actually sent or received, the writing need not be produced.⁶ In the case of telegraphic

¹ See *post*, § 205.

² 1 Greenl. on Evid., § 87.

³ *State v. New York, etc. Co.* (N. Y., 1890), 8 Atl. Rep. 290.

⁴ *File v. Springel*, 132 Ind. 312; *Martin v. Bowie* (S. C., 1893), 15 S. E. Rep. 736. So the owner of real or personal property will not be required to produce a writing by which the ownership became vested in him, but may testify to the fact of ownership where he does not base his claim on a writing and where the fact of ownership is collateral. *Gal-*

legher v. Insurance Co., 30 W. N. C. 105; *Philips v. Huntington*, 35 W. Va. 406.

⁵ Thus, where the question involved was the rental value of premises in a suit to recover compensation for the condemnation under the right of eminent domain, the production of the lease in writing is not necessary, but the rental value may be proved by verbal evidence from tenants. *Griswold v. Metropolitan El. Ry. Co.*, 14 Daly, 484.

⁶ *Conner v. State*, 23 Tex. App. 378;

dispatches, where the receiver of the dispatch is the employer of the company, the original is the writing delivered to the company's operator by the sender. But where the company is the agent of the sender, then the original is the written message which is delivered to the addressee.¹

§ 35. **Collateral writings.**—In circumstances where the writing has no clear and direct bearing upon or connection with the point in issue or any relevancy to it, but is only collateral, no objection exists to introducing oral or secondary evidence of its contents. Thus, a report of an accident made by a witness as part of his duty need not be accounted for to render his oral testimony admissible.² So, too, in an action on contract, a written offer by one party which has not been accepted by the other may be proved by parol.³

An oral communication accompanying a written transaction and having the same significance and effect may be shown orally as independent evidence.⁴ So payment may be shown

Holcombe v. State, 28 Ga. 66; Western Union Tel. Co. v. Cline (Ind., 1894), 35 N. E. Rep. 564.

¹Thorp v. Philbin, 2 N. Y. S. 732; Utley v. Donaldson, 94 U. S. 29; Saveland v. Green, 40 Wis. 431; Williams v. Breckell, 37 Miss. 682; Magie v. Herman (Minn., 1892), 52 N. W. Rep. 909; Anheuser-Busch v. Huttmacher, 127 Ill. 657; Durkee v. Railroad Co., 29 Vt. 127; Western Union Tel. Co. v. Shatter, 71 Ga. 760; Trevor v. Wood, 36 N. Y. 307; Godwin v. Francis, 1 L. R. C. P. 293; Wilson v. Railroad Co., 31 Minn. 481. Under exceptional circumstances, as where the original telegram has been lost, it has been held that its contents may be shown orally where no writing or copy whatever exists. Terre Haute, etc. Co. v. Stockwell, 118 Ind. 102. Cf. McCormick v. Joseph, 83 Ala. 401; Prather v. Wilkins, 68 Tex. 187.

²Jacksonville, etc. Co. v. Wellman, 7 S. Rep. 845. Cf. Daniels v. Smith, 130 N. Y. 696.

³Schoenberger v. Hackman, 37 Pa.

St. 87; Pickett v. Abney (Tex., 1893), 19 S. W. Rep. 859; Supples v. Lewis, 37 Conn. 568; Tuckwood v. Hawthorn, 30 N. W. Rep. 705; 67 Wis. 326; Ward v. Busack, 46 Wis. 407; Bowen v. Bank, 18 N. Y. Supr. Ct. 226. A parent may testify orally to the birth of a child, as the entry in a family bible is not the best evidence. State v. Woods (Kan., 1892), 30 Pac. Rep. 520; Dobson v. Cathron, 34 S. C. 518. If the action is not to enforce the contract itself or to recover damages for its breach, but of the nature of replevin or an action of claim and delivery to obtain possession of the instrument itself, the plaintiff is absolved both from producing the paper or accounting for its absence. Ross v. Bruce, 1 Day (Conn.), 100; People v. Holbrook, 13 Johns. 90, cited in 1 Greenl. on Evid., § 88; Pritchard v. Norwood, 155 Mass. 539; 30 N. E. Rep. 80.

⁴See post, § 212; Cramer v. Shriner, 18 Md. 140; File v. Springel, 132 Ind. 312.

by evidence of the tender and acceptance, though a written receipt has been given;¹ and an oral demand may be proved though a written demand has been made.² So in an action to recover for delay in completing a building, the owner may show he has leased it without producing the lease, though it was in writing.³

A certificate, parish register, transcript of a public record or other writing is not the best evidence of the existence of the marriage relation, even though it has been declared by statute to be presumptive evidence of that fact.⁴ Though a certificate which is known to exist is not produced, the marriage may be proved by other evidence equally primary and original. Thus it may be shown by the witnesses who were present when it was solemnized, by the declarations or admissions of the parties, whether against interest or forming a part of the *res gestæ*, or it may be inferred or presumed from reputation⁵ combined with cohabitation and other circumstances and the conduct of the parties.⁶

§ 36. Exceptions in the case of records and appointments to office.—Public records of every sort, from the general inconvenience which would result from their removal from the usual places of custody, may be proved by a duly authenticated or certified copy or transcript.⁷ The courts in recent times have shown every disposition to extend this rule, and it has been applied to the books of private corporations where it was very inconvenient to produce them;⁸ but in such cases a reasonable effort must be shown to have been made to obtain possession of the original.⁹ Where a statutory mode of

¹ See *post*, § 211; *Coonrad v. Madden*, 126 Ind. 197; *Kingsbury v. Moses*, 45 N. H. 222; *Wolf v. Foster*, 13 Kan. 116; *Van Bokkelen v. Berdell*, 130 N. Y. 141. *Cf. contra*, *Steed v. Knowles* (Ala., 1893), 12 S. Rep. 75.

² *Smith v. Young*, 1 Campb. 439. *Cf. Wollner v. Lehman* (Ala., 1888), 4 S. Rep. 643; *W. U. Tel. Co. v. Collins*, 45 Kan. 88.

³ *Consaul v. Sheldon*, 35 Neb. 247. *Cf. Schurtz v. Kerkow*, 85 Cal. 277.

⁴ *Com. v. Dill*, 156 Mass. 226.

⁵ See § 114.

⁶ *In re Wallace*, 25 Atl. Rep. 260; 49 N. J. Eq. 539; *Baily v. State* (Neb., 1894), 55 N. W. Rep. 241; *In re Drinkhouse*, 24 Atl. Rep. 1083; 151 Pa. St. 294; *Arnold v. Cheseborough*, 46 Fed. Rep. 700; *United States v. Amador* (N. M., 1892), 27 Pac. Rep. 288; *In re Hamilton*, 12 N. Y. S. 708; *Smith v. Smith*, 52 N. J. L. 207; *In re Gall*, 9 N. Y. S. 426.

⁷ §§ 142, 146-150.

⁸ *Fox v. Baltimore, etc. Co.*, 34 W. Va. 466.

⁹ *Bourck v. Miller*, 26 Pac. Rep. 861.

proving a record by a certified copy is established, it cannot be proven by parol.¹ It has also been held that, where the records are lost, the loss and their contents may be shown by the testimony of a person having actual knowledge thereof.² Based upon the inconvenience entailed in compelling their production and their general notoriety, it has been repeatedly held that oral evidence may be given of the contents of resolutions passed at public meetings and of the inscriptions upon banners or flags used in public parades.³

Another exception to the rule requiring the production of written as the best evidence occurs in cases where a party is called upon to prove the validity of the appointment of a public officer. The writing by which the officer was appointed need not generally be produced; but on proof that the public official has acted notoriously as such, he will be presumed, in collateral proceedings at least, to have been legally and properly appointed, and this presumption will obtain until the contrary shall be made to appear.⁴ It is of no importance in what manner the question arises, or whether the officer be a party to the action, for it is a general principle that so far as his relations toward the public are concerned the appointment and tenure of a *de facto* official are *prima facie* as valid as those of an officer *de jure*.⁵

The true basis for the admission of oral evidence or certified copies of the contents of records being the inconvenience which would ensue if their actual production were required, it follows that monuments, natural or artificial, used to mark

¹ Roberts v. Connelle, 71 Tex. 11; 8 S. W. Rep. 626; Kentzler v. Kentzler, 3 Wash. 166.

² Cilley v. Van Patten (Mich., 1888), 35 N. W. Rep. 831; 69 Mich. 400; Richards' Appeal (Pa., 1888), 15 Atl. Rep. 903; Turnbull v. Richardson, 69 Mich. 400; 4 S. Rep. 613.

³ Rex v. Hunt, 3 B. & A. 566; Sheridan's Case, 31 How. St. Tr. 672.

⁴ North v. People, 28 N. E. Rep. 966; Wilcox v. Smith, 5 Wend. 231; Plymouth v. Painter, 17 Conn. 585; East Tenn. etc. Co. v. Davis, 8 S. Rep. 349; State v. Row (Iowa, 1892),

46 N. W. Rep. 872; Shiver v. Bentley, 78 Ga. 537; 3 S. E. Rep. 770; Burke v. Cutler (Iowa, 1890), 43 N. W. Rep. 204. That a commission is only *prima facie* evidence of title, see State v. Peel (Ind., 1890), 24 N. E. Rep. 440. *Contra*, Webb Co. v. Gonzales (Tex., 1889), 6 S. W. Rep. 781.

⁵ Com. v. Kane, 108 Mass. 423; Woolsey v. Roundout, 4 Abb. (N. Y.) App. Dec. 172; Cromer v. Bornest, 27 S. C. 436; 3 S. E. Rep. 849; New Portland v. King, 55 Me. 172.

the boundaries of land, mural tablets, gravestones and similar bulky articles need not be produced in court for the purpose of proving the inscriptions upon them. So the oral evidence of the surveyor who has surveyed land is admissible, not only to show the original location of a boundary line,¹ and the position of the monuments by which it was settled, even when the monuments have been destroyed,² but his testimony is also admissible, from necessity, of the marks which were blazed upon the trees along the boundary line.³ But by United States statutes, section 2396, the field-notes and plats of the original surveyor are made primary evidence of the original boundary of public lands.

§ 37. **Exception in the case of general results.**—To prevent the time of the court from being unduly occupied in the examination of evidence consisting of numerous and bulky books and papers in order to prove a single fact or circumstance, the production of such voluminous writings may be dispensed with, and a witness may state verbally the general result of his examination of books or written instruments made out of court. Here it should be noted the witness is not asked to testify to the contents of the writings. He is asked to give primary evidence of an independent fact within his personal knowledge which he has ascertained by the use of his own powers of observation.⁴ Thus an expert who has examined the books of account bearing upon the facts in issue may testify that a certain general balance is due thereon;⁵ and where an issue of bankruptcy or insolvency is concerned, the general result of an examination of the books and securities of the debtor may be stated without their actual production in court.⁶ But a

¹ Sheetz v. Sweeney, 26 N. E. Rep. 648.

² Bohrer v. Lange, 44 Minn. 281.

³ Ayers v. Watson, 137 U. S. 584.

⁴ Schroeder v. Fry, 14 N. Y. S. 71; Burton v. Driggs, 20 Wall. (U. S.) 136; Boston, etc. Co. v. Dana, 1 Gray (Mass.), 83; Holbrook v. Jackson, 7 Cush. 136; Stocking v. St. Paul Trust Co., 39 Minn. 40; 40 N. W. Rep. 365. *Contra*, Fox v. Baltimore, etc. Co., 12 S. E. Rep. 757; 34 W. Va. 466; McCall v. Moscovitz, 14 Daly, 16. *A fortiori*

if the books are themselves in evidence, it is not error to permit an expert book-keeper who has examined them to state the result of his examination on the witness stand. Culver v. Marks, 122 Ind. 554; 22 N. E. Rep. 1086.

⁵ Culver v. Marks, 122 Ind. 554; Wolford v. Farnham, 47 Minn. 95.

⁶ Meyer v. Sefton, 2 Stark. 274. A debtor's liabilities can be proved by the verbal evidence of his creditors without producing any written evi-

witness will not be permitted to testify to the single fact that a certain sale had not been made where he learns that fact only from an examination of the plaintiff's books, unless the books are also produced.¹

§ 38. **Admissions as primary evidence.**—As to whether a party's admission of the existence and contents of a writing will render unnecessary notice to him to produce it, and whether his admission can be used against him as secondary evidence of the contents of the writing, the cases are divided. The execution of a deed or other attested instrument must be proved when it is produced, though the grantor, while denying its execution, may have admitted all its statements of fact.² If the existence or contents of a deed or other instrument which is not produced be in issue, it has been held that the admission of the party claiming under it or of a party holding under him is primary evidence of the truth of any fact which is recited therein.³ But there are decisions which sustain the contrary proposition;⁴ and in any event the admission of the party ought to be rejected where, instead of a statement of facts recited in the writing, it consists of a *confessio juris* or opinion of the party upon its legal operation and effect.⁵ Where the admission involves a statement of facts as well as a statement of the legal effect of a writing, as where the party declared he was "possessed of a leasehold,"⁶ or had "dissolved articles of partnership,"⁷ it will be admissible as primary evidence of the contents of the writing itself, in its entirety.⁸

dences of indebtedness which they may hold. Rutledge v. Hudson, 80 Ga. 266; 5 S. E. Rep. 93.

¹Hamilton v. Northwood (Mich., 1891), 49 N. W. Rep. 37.

²See *post*, § 133.

³Slatterie v. Pooley, 6 M. & W. 664; Murray v. Gregory, 5 Wels. & H. 468; Morey v. Hoyt (Conn., 1893), 26 Atl. Rep. 127; Taylor v. Peck, 21 Gratt. (Va.) 11; Loomis v. Wadham, 8 Gray (Mass.), 557; Hoeftling v. Hambleton (Texas, 1892), 19 S. W. Rep. 689; Edwards v. Tracy, 62 Pa. St. 374; Blackington v. Rockland, 66 Me. 332; Terry v. Rodahan, 79 Ga.

278; Edgar v. Richardson, 33 Ohio St. 581; Cumberland Mut. Fire Ins. Co. v. Giltman, 48 N. J. L. 495; 7 Atl. Rep. 424; Wolverton v. State, 16 Ohio St. 173.

⁴1 Greenl. on Evid., § 96, citing Lawless v. Quele, 8 Ir. L. 382; Welland Canal v. Hathaway, 8 Wend. 480; Jenner v. Jolliffe, 6 Johns. 9; Hasbrouck v. Baker, 10 id. 248.

⁵Bloxam v. Elsie, 1 C. & P. 558; Scott v. Clare, 3 Campb. 236; Rex v. Inhabitants, 3 B. & Ald. 588.

⁶Digby v. Steel, 3 Campb. 115.

⁷Doe v. Miles, 1 Stark. 181.

⁸See 1 Greenl. on Evid., § 96.

§ 38a. **Photographs as primary evidence.**—Photographs are admissible as primary evidence upon the same grounds and for the same purposes as are diagrams, maps and drawings of an object or locality which is the subject of controversy. Photographs have been received for the purpose of describing and identifying the premises which are in litigation,¹ or to furnish a means of identifying persons,² to present visible representation of physical injuries,³ to supply accurate *fac-similes* of public records which could not themselves be conveniently brought into court;⁴ and enlarged photographs of disputed writings emphasizing, illustrating and making more prominent peculiarities of handwriting have been employed by experts as standards of comparison.⁵ If the accuracy of the photograph is shown *prima facie* either by the party taking it or by some other competent witness⁶ giving evidence that the photograph faithfully represents the object, it should go to the jury subject to impeachment by the other side by means of testimony tending to show its inaccuracy.⁷

¹ Nies v. Broadhead, 27 N. Y. S. 52; Cozzens v. Higgins, 33 How. Pr. 439; Blair v. Pelham, 118 Mass. 421; Ayers v. Harris, 77 Tex. 108; Church v. Milwaukee, 31 Wis. 519; Locke v. Railroad Co., 46 Iowa, 112.

² People v. Smith, 121 N. Y. 578; Luke v. Calhoun Co., 52 Ala. 118; Wash. L. Ins. Co. v. Scheible, 1 W. N. C. 369; Wilcox v. Wilcox, 46 Hun, 32; Udderzook v. Com., 76 Pa. St. 340; Ruloff v. People, 45 N. Y. 224.

³ Franklin v. State, 69 Ga. 42.

⁴ Leathers v. Salvor Wrecking Co., 2 Woods, 682; Luco v. United States, 23 How. 541; Daly v. Maguire, 6 Blatchf. 137.

⁵ Rowell v. Fuller, 59 Vt. 688; Buzard v. McAnulty, 77 Tex. 438; Tome v. Railroad Co., 39 Md. 90; Marcy v. Barnes, 16 Gray, 163; Eborn v. Zimpleman, 47 Tex. 519; Foster's Will, 34 Mich. 237. See, also, Anderson's Law Dict.; 20 Alb. L. J. 4-6; 24 id. 182-184.

⁶ Roosevelt v. Railroad Co., 66 Hun, 633.

⁷ Turner v. Boston, etc. Co. (Mass., 1893), 33 N. E. Rep. 520; Leidlein v. Mayer (Mich., 1893), 55 N. W. Rep. 367; Omaha, etc. Co. v. Beeson (Neb., 1893), 54 id. 557; Missouri, etc. Co. v. Moore (Tex., 1891), 15 S. W. Rep. 714; Kansas, etc. Co. v. Smith, 90 Ala. 25; Com. v. Switzer, 134 Pa. St. 333; Ming v. Foote, 9 Mont. 201; Archer v. N. Y., N. H. etc. Co., 106 N. Y. 603; Cowley v. People, 83 N. Y. 464; People v. Buddensieck, 103 id. 500; Durst v. Masters, L. R. 10 Prob. Div. 373, 378; Ortiz v. State, 30 Fla. 256. If a party denies that he signed an instrument a photograph of which is introduced, it has been held that the testimony of a witness who is acquainted with his handwriting is not admissible to show that the photograph accurately reproduces his genuine signature. Buzard v. McAnulty, 77 Tex. 438; 14 S. W. Rep. 138. In criminal trials a photograph

But the photograph, plan or diagram must be relevant, and its relevancy will depend on whether the scene or object which it portrays is relevant. The question of relevancy as distinct from the correctness of the photograph is for the judge exclusively, and is to be determined upon the same considerations which govern him where the relevancy of any sort of evidence is concerned.¹

Upon the same ground that photographs, maps and plans have been admitted in evidence, pencil or pen-and-ink sketches will be received to identify or explain localities. Their accuracy ought, however, to be shown by the testimony of the person who made them, or some other competent witness, stating under oath that of his own knowledge and observation they faithfully represent the object depicted.²

§ 39. Exhibition of articles in court.—An article the relevancy of which has been shown by being identified with the subject-matter of the issue may be exhibited to the jury in the court-room to enable them to understand the evidence or to realize more fully its force and cogency. Thus the district attorney has been permitted to exhibit to the jury an instrument with which it is alleged an abortion was committed,³ or a pistol or other weapon or article with which a homicide has been committed, and a witness will be allowed to ex-

of the defendant taken shortly after or prior to his arrest is admissible to show his appearance on or about that date, particularly where the evidence of his personal appearance is contradictory. *State v. Ellwood*, 17 R. I. 763; *Com. v. Morgan* (Mass., 1893), 34 N. E. Rep. 458.

¹ *Verran v. Baird*, 150 Mass. 150. The fact that a change had been made in the building which was photographed does not render the latter irrelevant if the change is not material. *Glazier v. Hebron*, 62 Hun, 137; *Pashall v. Railroad Co.*, 66 id. 633. A photograph taken by an amateur who had never visited the place before was held inadmissible in *Cleveland, etc. Co. v. Monaghan*, 140

Ill. 474. The relevancy of photographs is largely in the discretion of the court, and, unless a manifest injustice has been done, its action will not be reviewed. So even where a party, because of personal injuries, is himself unable to be present and testify, it was held proper to refuse to receive a photograph of him made a year before as proof of his condition at the date he was injured, though it was shown his condition had not changed. *Gilbert v. West End St. Ry. Co.* (Mass., 1894), 36 N. E. Rep. 60.

² *People v. Johnson* (N. Y., 1893), 35 N. E. Rep. 604.

³ *Com. v. Brown*, 14 Gray (Mass.), 419.

plain how it could have been used.¹ The clothing worn by the deceased may be shown to illustrate to the jury how close the defendant was to him when he was killed.² Under similar circumstances the vertebra of the deceased, if properly identified, may be submitted to the inspection of the jury, an objection that such a course is prejudicial to the accused as calculated to excite feelings of horror in the mind of the jurors being deemed without merit.³ Portions of a body of a woman on whom an abortion is alleged to have been committed, preserved in spirits, may be shown to the jury as explanatory and illustrative of the evidence of the physician who conducted the post-mortem examination.⁴ The clothing of the defendant may be exhibited to the jury to show that spots thereon are blood-stains, though the article itself may have been procured from him without his knowledge of the purpose for which it was to be used.⁵ So criminating articles which are relevant may be shown on the trial, though they were irregularly or illegally obtained from the defendant;⁶ nor does a constitutional enactment providing that no one shall testify against himself hinder the use of the garments or other articles belonging to the prisoner for this purpose.⁷ Ordinarily it is necessary that the articles exhibited should be connected *prima facie* at least with the transaction in issue. Though it has been permitted,⁸ the propriety and justice of

¹ State v. Roberts, 63 Vt. 159; Si-
berry v. State (Ind., 1893), 33 N. E.
Rep. 681; Roderiquez v. State (Tex.,
1893), 22 S. W. Rep. 978; Com. v.
Brown, 121 Mass. 69; Hornsby v.
State, 94 Ala. 55; State v. Crow (Mo.,
1892), 17 S. W. Rep. 744; People v.
Gonzales, 35 N. Y. 49; People v.
Fernandez, 35 id. 49, 64; State v.
Mordecai, 68 N. C. 207; Leonard v.
Railway Co., 21 Oreg. 655; Gardiner
v. People, 6 Park. Cr. Cas. (N. Y.) 157;
State v. Graham, 74 N. C. 646.

² People v. Wright (Mich., 1892), 50
N. W. Rep. 792; Watkins v. State, 89
Ala. 82; Frizzell v. State (Tex., 1891),
16 S. W. Rep. 751; Levy v. State, 28

Tex. App. 203; People v. Knapp, 71
Cal. 1; Abb. Cr. Brief, § 586.

³ Turner v. State, 89 Tenn. 547;
State v. Moxley, 102 Mo. 374.

⁴ Com. v. Brown, 14 Gray (Mass.),
419.

⁵ State v. Baker, 33 W. Va. 379.

⁶ Com. v. Tibbetts (Mass., 1893), 32
N. E. Rep. 910; Gindrat v. People
(Ill., 1893), 27 N. E. Rep. 1085; Sie-
bert v. People (Ill., 1893), 32 N. E.
Rep. 431. See *post*, §§ 197, 198.

⁷ Drake v. State, 75 Ga. 413, 415;
State v. Ah Clung, 14 Nev. 79, 83;
State v. Garrett, 71 N. C. 95.

⁸ State v. Ellwood, 24 Atl. Rep.
782; 17 R. I. 763; State v. Duncan
(Mo., 1893), 22 S. W. Rep. 690.

permitting articles such as deadly weapons, lanterns, masks and other tools used by burglars and similar articles which are not the articles alleged or shown by any evidence to have been employed by the accused to be exhibited to the jury may well be doubted. Such a custom, under the guise of illustrating and explaining the evidence, is well calculated to create prejudice in the jury.

CHAPTER IV.

HEARSAY.

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| <p>§ 50. Definition — Grounds for its rejection.</p> <p>51. Statements to be proved as facts.</p> <p>52. Expressions of bodily or mental feeling.</p> <p>53. Pedigree — Oral and written declarations.</p> <p>54. Declarations constituting a part of the <i>res gestæ</i>.</p> <p>55. Requisites.</p> <p>56. Must be illustrative and connected with main transaction.</p> | <p>§ 57. Must be contemporaneous.</p> <p>58. Entries as part of the <i>res gestæ</i> and made by third persons.</p> <p>59. Entries against interest and entries which are part of the <i>res gestæ</i> distinguished.</p> <p>60. A party's own books as evidence.</p> <p>61. The declarations of agents when a part of the <i>res gestæ</i>.</p> <p>62. Indorsements as part of the <i>res gestæ</i>.</p> |
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§ 50. Definition — Grounds for its rejection.— The term "hearsay," as used in the law of evidence, signifies all evidence which is not founded upon the personal knowledge of the witness from whom it is elicited, and which consequently does not depend wholly for its credibility and weight upon the confidence which the jury may have in him.¹ Its value, if

¹ "Hearsay is that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person." 1 Greenl. on Evid., § 99. "Hearsay is . . . literally what the witness says he heard another person say." Bouvier's Law Dict. "Hearsay is what is heard as rumored; testimony not a matter of personal knowledge with the witness." Anderson's Law Dict. The question, Is evidence when presented hearsay or original? is one in the exclusive province of the court. Harter Medicine Co. v. Hopkins, 83 Wis. 309; 53 N. W. Rep. 501. See, also, Gross v. Moore, 68 Hun, 412; 23 N. Y. S. 1019; Brown v. Prude (Ala., 1893), 11 S. Rep. 838; Dountain v. Connellee (Tex., 1893), 21 S. W. Rep. 856; Befay v. Wheeler (Wis., 1893), 53 N. W. Rep. 1121; Mathis v. Pridham, 1 Tex. Civ. App. 58; Atchison, etc. Co. v. Parker, 55 Fed. Rep. 595; Ellis v. Whitehead (Mich., 1893), 54 N. W. Rep. 752. Self-serving statements—*i. e.*, statements made out of court by a party in his own favor—are hearsay if not acquiesced in by the adverse party so as to operate as admissions or by way of estoppel. Whitney v. Houghton, 125 Mass. 451; Siva v. Wabash R. R. Co. (Mo., 1893), 21 S. W. Rep. 915. But it is not hearsay for a witness, whether a party or not, to repeat on the witness stand his prior statement made out of court. Charles v. State, 49 Ala. 332. See *post*, § 79.

any, is measured by the credit to be given to some third person not sworn as a witness to that fact, and consequently not subject to cross-examination. When the requirement is made that a witness can testify to those facts only of which he has some personal knowledge,¹ it is not meant that each witness must have actual personal knowledge of the principal facts which are in issue on the one hand, or a full knowledge of all the details to which he is expected to testify on the other. The utmost reasonable requirement that can be made is that he should have an actual knowledge of the facts, not derived from any other person's knowledge of the truth or falsity of any transaction to which he is going to testify.² Any statement made by him of anything which another person has told him as to those facts is generally hearsay and inadmissible, no matter how worthy of credit that person would be if called as a witness.

The utility and value of cross-examination and of the sanction of an oath as tests of the truth of testimony being evident from long experience, it is necessary under such circumstances to call the person who was the witness' informant to testify to those matters which are hearsay in the mouth of any other person.³

¹ The fact that a witness claims to be testifying from his own personal knowledge is not of course conclusive. He may be self-deceived; and what he calls his personal knowledge may consist of mental impressions created by circumstances collateral to the main point in issue or stamped unconsciously upon his mind by the statement of others, but which from lapse of time and his unshaken belief in their truth he now regards as acquired through his own powers of observation. *Lamar v. Pearce* (Ga., 1893), 17 S. E. Rep. 92.

² *West v. Home Ins. Co.*, 18 Fed. Rep. 622.

³ 1 Greenl. on Evid., §§ 98, 124, 163; *Bacon v. Hanna*, 63 Hun, 625; *Hunter v. Lanius*, 18 S. W. Rep. 201; 82 Tex. 677; *Wallace v. Story*, 139 Mass.

115; *Dubois v. Perkins*, 21 Oreg. 189; *Orr v. Orr*, 34 S. C. 275; *Glenn v. Ligett*, 47 Fed. Rep. 472; *Corwin v. Morehead*, 51 Iowa, 99; *Mutual, etc. Co. v. Tillman*, 84 Tex. 31; 19 S. W. Rep. 294; *McLeod v. Lee*, 17 Nev. 103 (declaration of decedent); *Hard v. Ashley*, 63 Hun, 634; *Sangster v. Dalton* (Ark., 1890), 12 S. W. Rep. 202; *Fordyce v. McCants*, 51 Ark. 509; *Fitzgerald v. Williams*, 148 Mass. 462; *Harris v. Railroad*, 78 Ga. 525; *Tarbox v. Shuegrue*, 36 Kan. 225; *Armstrong v. Ackley*, 71 Iowa, 76; *Alabama, etc. R. Co. v. Arnold* (Ala.), 2 S. Rep. 837; *East Tenn., V. & G. R. Co. v. Maloy*, 77 Ga. 237; *Wagoner v. Ruply*, 69 Tex. 700; *Ill. Cent. R. R. Co. v. Ruffin* (Miss., 1888), 3 S. Rep. 578; *Kaufman v. Springer*, 38 Kan. 730; *Louisville, etc. Co. v.*

Hearsay evidence is not confined to the repetition of that which is orally communicated. If information contained in a writing addressed to or read by him is given in evidence, not to prove the existence or to show the contents of the writing, but as having a direct bearing upon some fact in issue, then such evidence is hearsay.

The rule requiring the production of the best evidence of any transaction is founded upon the principle that oral evidence of the contents of a writing is substitutionary and its introduction indicative of better existing evidence which is withheld. The withholding, retention or suppression of better or more original evidence furnishes only a partial reason for the rejection of hearsay, for hearsay evidence is intrinsically and peculiarly weak at its inception. As applied to writings, the rule requiring the production of the best evidence and the rule rejecting hearsay are frequently confused.¹ This fact, taken in connection with the vague and loose meaning of the word "hearsay," as it is used, renders some further elucidation necessary. For example, suppose the existence, but not the contents, of a writing is inquired into. A witness may testify that he has seen it, and may further relate what disposition has been made of it.² Such evidence, as we shall see later, is not secondary, nor is it hearsay, but is original primary evidence of an independent fact — *i. e.*, the visual existence of the writing.³ If, however, the witness is questioned as to the contents of a writing, its production is indispensable by the rule requiring the best evidence of its contents, and oral evidence will not be received until its absence is satisfactorily accounted for.⁴ But if the witness in his evidence testifies as to some particular matter of fact — as, for example, the injury to the plaintiff, the knowledge of which has come to him not through his personal observation and presence, but from the perusal of a letter written by some third person, — then his evidence is

Wood, 113 Ind. 544; St. Louis v. Arnot, 94 Mo. 275; 7 S. W. Rep. 15; Eddy v. McCall (Mich., 1888), 39 N. W. Rep. 734; Insurance Co. v. Lane, 46 N. J. Eq. 316; Central R. Co. v. Kent, 84 Ga. 351; Doyle v. Church, 118 N. Y. 678; Nixon v. McKinney, 105 N. C. 23.

¹ See *ante*, § 30 et seq.

² Ramsey v. Hurley, 72 Tex. 194; Neland v. Murphy, 73 Wis. 326; State v. Sterling, 41 La. Ann. 679.

³ See § 51.

⁴ See *post*, § 130.

hearsay and inadmissible. Under such circumstances the writer of the letter should be called to witness to the fact in issue. Thus, where it was sought to hold defendant responsible for money left with him to be forwarded to A., the witness was not permitted to testify that A. had never received it, his only source of knowledge being letters received from A.¹

The intervention of an interpreter in an interview in which the witness participated, and through whom the witness acquired his information, does not render his knowledge of what was said hearsay, as the interpreter is regarded as the agent of both parties for the time being.²

The rule by the operation of which hearsay evidence is rejected because of the facility for the commission of fraud and perjury which would result from its acceptance being of general application, it becomes of great importance to distinguish carefully between evidence which is *hearsay* and that which may be considered *original*. No general rule of differentiation can be laid down. Whether evidence is original or hearsay depends of course to a very large extent upon the nature of the facts themselves—that is, whether they are within the personal knowledge of the witness or not. But much depends upon the circumstances of each particular case and upon the facts which are sought to be proved; so that evidence which consists of the language of a third person and which under some circumstances would be rejected as hearsay, will, in different circumstances, be admitted as original. The various cases in which declarations or writings of third parties not produced as witnesses are original evidence will now be considered.

§ 51. Statements to be proved as facts.—In cases where the truth or falsity of the statement made is immaterial, but the main question is whether the statement, information or advice was actually given or made, a witness may testify concerning statements made by third persons out of court who

¹ *Goldberg v. Wolff*, 10 N. Y. S. 355. See, also, *post*, §§ 77, 331a. But see, *contra*, *Territory v. Big Knot*

² *State v. Hamilton*, 8 S. Rep. 304; on Head, 6 Mont. 242; 11 Pac. Rep. 42 La. Ann. 1204; *Wise v. Newatney*, 670. See, also, 1 Whart. on Evid., 26 Neb. 88; 42 N. W. Rep. 339; Com. § 193. *v. Vose* (Mass., 1893), 32 N. E. Rep.

are not introduced as witnesses. Thus, if it is necessary to ascertain the motives which actuated a person's conduct, the information upon which he relied is important, and in substantiating the prudence, legality or good faith with which he claims to have acted he may introduce evidence of what advice or information he received. For this reason, in a suit for malicious prosecution, the advice or information which defendant acted upon may be given in evidence as original evidence tending to prove the existence of a probable cause.¹ But it has been held that the declaration of one not a party to the suit is not admissible to show the declarant's intention.² So, too, where the question of a person's sanity is involved, oral and written communications had with the alleged lunatic are admissible to show how his mental condition was regarded by those having dealings with him, but only in a case where the communications, being connected with some act done by him, have become a part of the *res gestæ*.³

To prove the fact of bankruptcy, or that a bankrupt has absconded, a witness may testify to what the bankrupt said about his financial condition or his future intentions.⁴ The same rule is applicable to the statement made to persons endeavoring to serve civil process where one is alleged to be avoiding its service.⁵ So language used by a person, either contemporaneous with or shortly before or after a certain act, is admissible to show the condition of his mind, *i. e.*, its weakness or strength at the time of the act. But such declarations are not admissible to show his intention where the law

¹ *Leahey v. Marsh*, 155 Pa. St. 458; *McClafferty v. Phelps*, 151 id. 86; *Com. v. Felch*, 132 Mass. 22; *Finn v. Frink*, 84 Me. 261; *Mark v. Hastings* (Ala., 1893), 13 S. Rep. 297; *Owens v. State*, 74 Ala. 401; *Hahn v. Schmidt*, 64 Cal. 284; *Atkins v. State*, 69 Ga. 595; *Johnson v. Miller*, 82 Iowa, 693.

² *North Stonington v. Stonington*, 31 Conn. 412.

³ *Paine v. Aldrich*, 30 N. E. Rep. 725; 133 N. Y. 544. So where fraudulent intent is in issue, the declarations of a party or of some third

person are always admissible to prove or to rebut the fraudulent intent. *O'Hare v. Duckworth*, 4 Wash. St. 470; *Ferbrache v. Martin* (Idaho, 1893), 32 Pac. Rep. 252; *Snyder v. Free* (Mo., 1893), 21 S. W. Rep. 847; *Hicks v. Sharp*, 89 Ga. 311.

⁴ *O'Hare v. Duckworth*, 4 Wash. St. 470; *State v. Penn*, 13 Bank. Reg. 464.

⁵ *Sumner v. Williams*, 5 Mass. 144; *Buswell v. Luicks*, 8 Daly (N. Y.), 518. *Cf. Werner v. Com.*, 80 Ky. 387.

requires intention to be manifested in writing as in the case of wills.¹

So, generally, if the only fact in issue is whether a certain statement was or was not made by some third person, it is not absolutely necessary to call that person, but the substance of his language may be given in evidence by one who was present and heard it.²

§ 52. Expressions of bodily or mental feeling.—Oral expressions of mental or physical sensations, where the declarant's condition of body or mind is material, may be given in evidence by a person who has heard them. The fact primarily in issue under such circumstances is whether the exclamations indicating pain, anger, malice or other passion were uttered, and to this fact the witness may testify, leaving all inquiry whether the feelings were feigned or real for the jury to determine. So ejaculations indicating the existence of pain³ or malice⁴ may be testified to by any one who heard

¹ Canada's Appeal, 47 Conn. 450; *Mooney v. Olsen*, 22 Kan. 69; *Maye v. Bradlee*, 127 Mass. 414; *Bush v. Bush*, 87 Mo. 480; *Tingly v. Cowgill*, 48 Mo. 201; *Rusling v. Rusling*, 36 N. J. Eq. 726; *Marx v. McGlynn*, 88 N. Y. 357; *Herster v. Herster*, 122 Pa. St. 239; *Conway v. Vizzard*, 122 Ind. 266; *Potter v. Baldwin*, 133 Mass. 427; *Shailer v. Bumstead*, 99 Mass. 112; *Gibson v. Gibson*, 24 Mo. 227; *Middleditch v. Williams*, 45 N. J. Eq. 726. Where undue influence is alleged in the execution of a will, the declarations of the testator are admissible to show the state of his mind and his feelings towards his relatives and the beneficiaries under the will. *Jones v. Roberts*, 37 Mo. App. 163; *Gardner v. Frieze*, 16 R. I. 640. See *post*, §§ 208, 222.

² *Phelps v. Foot*, 1 Conn. 387.

³ *Bloomington v. Osterlee*, 189 Ill. 120; *Bennett v. Northern Pac. R. R. Co.* (N. D., 1893), 49 N. W. Rep. 408; *Lacas v. Detroit City R. Co.* (Mich., 1893), 52 N. W. Rep. 745; *Sturgeon v.*

Sturgeon (Ind., 1893), 30 N. E. Rep. 805; *Holly v. Bennett*, 46 Minn. 386; *Blair v. Madison*, 81 Iowa, 313; *Smith v. Dittman*, 16 Daly, 427; *Grand Rapids, etc. Co. v. Huntley*, 38 Mich. 537; *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397; *Rogers v. Crain*, 30 Tex. 284; *Sanders v. Reister*, 1 Dak. Ter. 151; *Towle v. Blake*, 43 N. H. 92; *Hanna v. Hanna* (Tex., 1893), 21 S. W. Rep. 720; *Butler v. Man. Ry. Co.*, 24 N. Y. S. 142; *Hatch v. Fuller*, 131 Mass. 574; *Livingston's Case*, 14 Gratt. (Va.) 592; *Stevenson v. State*, 69 Ga. 68.

⁴ *State v. Crawfoot* (Mo., 1893), 22 S. W. Rep. 371; *Hall v. State*, 31 Tex. Crim. Rep. 565; *Gibson v. State*, 23 Tex. 414; *State v. Corcoran*, 38 La. Ann. 949; *Harrison v. State*, 79 Ala. 29; *Newton v. State*, 42 La. Ann. 83; *Pitman v. State*, 22 Ark. 354; *State v. Bradley*, 64 Vt. 466; *State v. Gainor* (Iowa, 1892), 50 N. W. Rep. 947; *State v. Hoyt*, 46 Conn. 330; *Le Beau v. People*, 34 N. Y. 223; *State v. Harrod*, 102 Mo. 590; *State v. Wentworth*,

them.¹ This principle is applied in an action brought by a wife to recover damages for the alienation of her husband's affections. The husband's declarations or letters, addressed to the wife or to third persons, dating prior to the alleged perpetration of the wrong by defendant, are admissible as original evidence of the fact that before the alienation she possessed his affection.²

The statements or declarations of a sick person, or of one who has met with an accident, regarding his present pain and suffering, and the nature, present symptoms and existing effects of the illness or accident from which he is suffering, are admissible as original evidence.³ When the declarations of the sick person are merely narrative of prior details connected with his illness, they will generally be inadmissible whether made to a physician or to some other person, unless, being connected with the patient's present condition, they are considered a part of the *res gestæ*.⁴

37 N. H. 196; *Pete v. State*, 44 La. Ann. 14; *Dixon v. State*, 13 Fla. 636; *Hardee v. State*, 31 Tex. Crim. Rep. 289; *Everett v. State*, 62 Ga. 65; *Riggs v. State*, 30 Miss. 635; *Schoolcraft v. People*, 117 Ill. 271; *State v. Sullivan*, 51 Iowa, 142; *State v. Hymer*, 15 Nev. 49. See *post*, § 189.

¹ On this ground the threats made by a person charged with homicide are, if not too remote, admitted to show his malice or premeditation.

² *Yundt v. Hartranft*, 41 Ill. 9; *Rounds v. Rounds*, 64 Vt. 432; *Willis v. Barnard*, 8 Bing. 376; *Gilchrist v. Bale*, 8 Watts, 355; *Wilton v. Webster*, 7 Car. & P. 198; *Coleman v. White*, 43 Ind. 429; *Bigoonette v. Paulet*, 134 Mass. 123.

³ *Helton v. Alabama M. Ry. Co.* (Ala., 1893), 12 S. Rep. 276; *Hewett v. Eisenbart* (Neb., 1893), 55 N. W. Rep. 252; *Bush v. Barnett*, 96 Cal. 202; *International, etc. Co. v. Kuehn* (Texas, 1893), 21 S. W. Rep. 53; *Schuler v. Third Ave. R. Co.*, 1 Misc. R. 351; *Brusch v. St. Paul City Ry.*

Co. (Minn., 1893), 55 N. W. Rep. 57; *Newson v. Dodson*, 61 Texas, 91; *Fay v. Harlan*, 128 Mass. 244; *Earl v. Tupper*, 45 Vt. 275; *Matteson v. N. Y. & R. R. Co.*, 62 Barb. (N. Y.) 364; *Chicago, etc. Co. v. Spilker* (Ind., 1893), 33 N. E. Rep. 280; *State v. Howard*, 32 Vt. 380; *Taylor v. Railroad Co.*, 48 N. H. 309; *Gray v. McLaughlin*, 26 Iowa, 279; *Bloomington v. Osterle*, 139 Ill. 120; *Bennett v. Railroad Co.*, 2 N. D. 112; *Lacas v. Railroad Co.*, 92 Mich. 412.

⁴ *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Jones v. Portland*, 88 Mich. 598; *Collins v. Waters*, 54 Ill. 485; *Davidson v. Cornell*, 132 N. Y. 228; *Smith v. State*, 53 Ala. 486; *Ashland v. Marlborough*, 99 id. 47; *Mayo v. Wright*, 63 Mich. 40; *Illinois Central R. R. Co. v. Sutton*, 42 id. 438; *Lacas v. Railroad Co.*, 92 Mich. 412; *Barber v. Miriam*, 11 Allen (Mass.), 322; *Schuler v. Third Ave. R. Co.*, 20 N. Y. S. 683; *Holly v. Bennett*, 46 Minn. 486; *Blair v. Madison*, 81 Iowa, 313. Cf. *post*, §§ 188-190.

There are many cases, however, which sustain a different rule as regards declarations descriptive of past events. Thus, where a physician is called to diagnose the disease or determine the nature of the accidental injury with a view to the proper method of treating it, or to testify as an expert, it is held that he may testify to language of the patient describing his symptoms, condition, feelings and other details either past or present. Only language which is used in the examination or treatment, or to enable the physician to testify as an expert, is admissible.¹ The admissibility of statements of physical suffering of this sort is largely due to the necessity of proving facts which can only become known to others through the utterances of the sufferer himself. A scream, a groan, or a cry of some sort, is the natural expression of intense pain in man, and testimony that a scream was heard is always original evidence. Some of the courts seem to limit the admissibility of testimony to mere involuntary exclamations or ejaculations of pain, as screams, groans or sighs, basing their rulings upon the fact that as the common-law disability of a party as a witness no longer exists, the sufferer may and should be placed upon the stand, if living, while, if deceased, his prior suffering is immaterial, as it does not constitute an element in the damages to be recovered by his representatives.²

The competency of a party as a witness is purely statutory, and the rule that statutes amendatory of or derogatory to the common law should be strictly construed would doubtless apply. It cannot be reasonably conceived that the legislature, by adding to the rights of the party by making him compe-

¹Equitable Mut. Life Acc. Ass'n v. McCluskey (Colo., 1892), 29 Pac. Rep. 383; Mut. Life Ins. Co. v. Tillman, 84 Tex. 31; 19 S. W. Rep. 294; Davidson v. Cornell, 10 N. Y. S. 521; Quaife v. Chicago, etc. Ry. Co., 48 Wis. 513; Louisville, New Alb. & Chick. R. R. Co. v. Falvey, 104 Ind. 416; Cleveland, Col., C. & Ind. R. R. Co. v. Newell, 104 Ind. 269; Chicago, etc. Co. v. Spilker (Ind., 1893), 33 N. E. Rep. 280; Bloomington v. Osterle, 139 Ill. 120; Pullman v. Smith, 79 Tex. 468. *Contra*, Abbot v. Heath (Wis., 1893), 54 N. W. Rep. 574; Jones v. Portland, 88 Mich. 598; Davidson v. Cornell, 132 N. Y. 228.

²Stewart v. Everts (Wis., 1890), 44 N. W. Rep. 1092; Caldwell v. Murphy, 11 N. Y. 416; Reid v. N. Y. C. R. R. Co., 45 N. Y. 574; Werely v. Persons, 28 N. Y. 344; Abbot v. Heath (Wis., 1893), 54 N. W. Rep. 574.

tent as a witness, intended by implication to abridge his rights in another direction and deprive him of the legitimate advantage which he had enjoyed by having his declaration of suffering, other than mere ejaculations, rendered inadmissible.¹

The fact that a victim of rape was crying,² or made immediate complaint, being material evidence of such complaint, is admissible as original evidence,³ though it seems that a witness will not be permitted to testify to the particular facts and details of the assault as related by the complainant,⁴ unless the statement is so closely connected with the commission of the crime in time and place as to form a part of the *res gestæ*.⁵

§ 53. **Pedigree—Oral and written declarations.**—The term "pedigree" includes facts relating to the descent and relationship of an individual, to his birth, marriage and death, and to the dates upon which these several events occurred.⁶ The declarations of third persons to such facts are receivable if the declarants are deceased, if they were related to the person whose pedigree is involved or to one from whom he is descended, so that they would not only have adequate means of knowing but an active interest in knowing the facts. So it was held at an early period that the deceased declarant must have been connected by family ties, either of marriage or blood, with the party whose pedigree is under investigation.⁷

¹ *Hancock v. Leggett*, 115 Ind. 546.

² *State v. Bedard*, 26 Atl. Rep. 719.

³ *Johnson v. State*, 21 Tex. App. 368; *Territory v. Godfrey*, 6 Dak. 46.

⁴ *Territory v. Edie* (N. M., 1893), 30 Pac. Rep. 581; *Baccio v. People*, 41 N. Y. 265; *People v. O'Sullivan*, 104 N. Y. 493; *People v. McCrea*, 32 Cal. 98; *People v. Stewart* (Cal., 1893), 32 Pac. Rep. 8. *Contra*, *Barnes v. State*, 88 Ala. 204. If, however, the complaint is too long delayed, it will not be admissible. *Richards v. State* (Neb., 1893), 53 N. W. Rep. 1027. But *contra*, *State v. Mulkern*, 85 Me. 106.

⁵ *McMurrin v. Rigby*, 80 Iowa, 322; *Castillo v. State* (Texas, 1892), 19 S. W. Rep. 892. The declarations of a child four years old have been re-

ceived. *State v. Jerome*, 82 Iowa, 749; 48 N. W. Rep. 722.

⁶ 1 Greenl. on Evid., § 104; 1 Whart. on Evid., § 208; *Swink v. French*, 11 Lea, 80; *Amer. Tr. Co. v. Rosenagle*, 77 Pa. St. 516. In *Stephen's Dig. Evid.*, § 31, this rule is confined to cases where the pedigree is directly in issue, and where the pedigree while relevant is merely collateral, the evidence is excluded. *Whitbeck v. Walters*, 4 C. & P. 375. This rule, however, has not received universal support. See *contra*, *Clark v. Owens*, 18 N. Y. 434; *North Brookfield v. Warren*, 16 Gray, 174.

⁷ 1 Greenl. on Evid., § 103, citing *Vowles v. Young*, 13 Ves. 140; *Casey v. O'Shaughnessy*, 7 Jur. 1140; *Gregory*

A stricter rule is adopted in the English cases, which hold declarant must have been legitimately related by blood to the person whose pedigree is in question, or he or she must have been the husband or wife of that person.¹ However consonant to principles of public policy this stringent rule may seem, it is obviously inapplicable in a thinly-inhabited community whose residents are constantly changing their places of domicile and where family connections and acquaintance with family affairs are more or less disregarded. On this account the more liberal rule by which the declaration of any deceased member of the family is admitted is supported by the large majority of the American decisions.² It is for the judge to decide whether the person who is quoted was a member of the family;³ and the fact of relationship,⁴ together with the death of the declarant, must be shown prior to the admission of the declaration.⁵

This rule by which the introduction of evidence of pedigree is permitted is not confined to oral statements. Memoranda or entries made in family bibles or other books appertaining to facts of family history or pedigree are admissible as declarations of the person making the entries if he was a member of the family.⁶ So, too, declarations or recitals upon matters

v. Baugh, 4 Rand. 607; *Kaywood v. Barnett*, 3 Dev. & B. 91; *Waldron v. Tuttle*, 4 N. H. 371; *Jewell v. Jewell*, 17 Pet. 213; *Chapman v. Chapman*, 2 Conn. 347; *Boone v. Miller*, 73 Tex. 557.

¹ *Smith v. Tebbitt*, L. R. 1 P. & M. 354; *Shrewsbury Peerage Case*, 7 H. L. C. 26; *Hitchins v. Eardley*, L. R. 2 P. & M. 248.

² *Butrick v. Tilton* (Mass., 1892), 29 N. E. Rep. 1088; *Boone v. Miller*, 73 Tex. 564; *Eisenlord v. Krum* (N. Y., 1890), 27 N. E. Rep. 1024; *Walkup v. Pratt*, 5 Harr. & J. 51; *Banert v. Day*, 3 Wash. C. C. 243; *Cuddy v. Brown*, 78 Ill. 415; *Backdahl v. Lodge*, 46 Minn. 61; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Jones v. Jones*, 36 Md. 447; *Dawson v. Mayall*, 45 Minn. 408; *Lowder v. Schluter*, 78 Tex. 103;

Moors v. Bunker, 29 N. H. 42; *Tyler v. Flanders*, 57 N. H. 618; *Kelly v. McGuire*, 15 Ark. 555. The declarations must have been made prior to the inception of the controversy, though they are not inadmissible because they were made to prevent it. *Com. v. Felchs*, 132 Mass. 23; *Caujolle v. Ferrie*, 23 N. Y. 91; *Hill v. Hibert*, 19 W. R. 250; *Berkely Peerage Case*, 4 Campb. 401-417; *Shedden v. Patrick*, 2 Sw. & Tr. 170.

³ *Doe v. Davis*, 11 Jur. 607.

⁴ *Thompson v. Wolf*, 8 Oreg. 454.

⁵ *Greenleaf v. Dubuque R. R. Co.*, 30 Iowa, 301; *Northrop v. Hale*, 76 Me. 309.

⁶ *Berkely Peerage Case*, 4 Campb. 401, 418; *Jackson v. Cooley*, 8 Johns. 128, 131; *Douglas v. Saunderson*, 2 Dall. 116; *Carskadden v. Poorman*,

of pedigree contained in family charts of pedigree or in family correspondence,¹ in wills, deeds of settlement or partition,² pleadings³ and affidavits⁴ are admissible.⁵ The principle upon which this description of evidence of pedigree is admitted being that such statements evincing the prevalent belief of those who had the best opportunities to acquaint themselves with the facts, it follows that inscriptions upon family monuments and tombstones and on family portraits, being of a semi-public nature, are peculiarly within the rule. Nor is it necessary to show that these inscriptions were made by a member of the family; for though this circumstance, in connection with the shortness of the period which has elapsed between the event they commemorate and the date of their erection, is strongly corroborative of their authenticity, their public character or the assent of the family is equivalent to proof that they represent the opinions of all its members.⁶

A declaration of a deceased parent as to the place of birth of his child is not receivable, a distinction being made between the place of birth and the fact of the birth.⁷

Evidence of general repute which prevails in a family as to the death,⁸ relationship⁹ or birth of one of its members, proved

10 Watts, 82; *Watson v. Brewster*, 1 Barr, 381; *Fulkerson v. Holmes*, 117 U. S. 397, cited in 1 Greenl. on Evid., § 104.

¹ 1 Greenl. on Evid., § 104; *Murray v. Milner*, L. R. 12 Ch. Div. 845; *Scharff v. Keener*, 64 Pa. St. 376; *Pearson v. Pearson*, 46 Cal. 609; *Neal v. Wilding*, 2 Str. 1151; *Elliott v. Pier-soll*, 1 Pet. 328; 1 Ph. Evid., 216, 217.

² *Fort v. Clarke*, 1 Russ. 601. See *Jackson v. Cooley*, 8 Johns. 128; *Jackson v. Russell*, 4 Wend. 543; *Keller v. Nutz*, 5 S. & R. 251; 1 Greenl. on Evid., § 104.

³ Phil. & Am. on Evid., 231, 232.

⁴ *Hurst v. Jones*, 1 Wall. Jr. 373.

⁵ See "Ancient Documents," § 106; *Hodges v. Hodges*, 106 N. C. 374.

⁶ *North Brookfield v. Warren*, 16 Gray (Mass.), 174; *Sowles v. Young*, 13 Ves. 144; *Eastman v. Martin*, 19 N. H. 152; *Camoy's Peerage*, 6 Cl. & Fin. 789; *Shrewsbury Peerage*, 7 H.

L. C. 1. Where an inscription on a tombstone was offered to show that a person was not the youngest son, it was held inadmissible in the absence of evidence identifying the person buried. *Gehr v. Fisher*, 143 Pa. St. 311.

⁷ *Union v. Plainfield*, 39 Conn. 563; *Tylers v. Flanders*, 57 N. H. 618; *Wilmington v. Burlington*, 4 Pick. 174; *McCarty v. Deming*, 4 Lans. 444. As matter of pedigree, a mother's language disparaging the legitimacy of her child is inadmissible. *Hargrave v. Hargrave*, 2 C. & K. 701.

⁸ *Mason v. Fuller*, 45 Vt. 29; *Anderson v. Parker*, 6 Cal. 197. Cf. *Wilson v. Brownlee*, 24 Ark. 546; *Morton v. Barrett*, 19 Me. 109; *Jackson v. Beneham*, 15 Johns. (N. Y.) 226; *Morrill v. Foster*, 33 N. H. 379; *Primm v. Stewart*, 7 Tex. 178.

⁹ *Pierce v. Jacobs*, 7 Mackey, 498; *Backdahl v. Lodge*, 46 Minn. 61.

by the evidence of a surviving member, is admissible as a matter of pedigree.¹ So a person may testify to the date of his own birth according to reputation in his family,² though evidence of family reputation as to a party's age has on the other hand been rejected.³

In the reception of traditionary evidence, caution should be employed in view of the inherent fallibility of the human memory, even in matters in which all men may be deemed to have a personal interest. Error being intermixed with truth, by dint of constant repetition and belief becomes at last indistinguishable from it. Though this sort of evidence is peculiarly subject to such disadvantages, that fact furnishes no valid ground for its rejection; but it remains for the jury, under proper instructions from the court, to decide upon its weight and sufficiency and to consider what credit to give to the witness from whom it is elicited.⁴

§ 54. **Declarations constituting *res gestæ*.**—It is almost always the case that the facts or transactions which are in issue in any judicial proceeding do not stand alone and unconnected with any other facts and circumstances. In consequence of the intricate and involved character of all human affairs, the main fact, the truth of which is sought to be substantiated or overthrown, may be, and usually is, either the cause or effect of many others, or is collaterally connected with other facts. Evidence of surrounding and connected circumstances relevant to the main point in issue or growing out of it is always admissible, and it is for the jury to determine upon its weight and sufficiency. When the surrounding circumstances are acts to which the witness is able to testify of

¹ Van Sickle v. Gibson, 40 Mich. 167; Morrill v. Foster, 33 N. H. 379; Eaton v. Tallmadge, 24 Wis. 217; Clements v. Hunt, 1 Jones (N. C.), 400.

² Bain v. State, 61 Ala. 75; State v. Cain, 9 W. Va. 559; Cherry v. State, 68 Ala. 29; Cheever v. Congdon, 34 Mich. 296; State v. McClain, 49 Kan. 730; Houlton v. Manteuffel (Minn., 1893), 53 N. W. Rep. 541; State v. Best (N. C., 1891), 12 S. E. Rep. 907.

³ Albertsen v. Robeson, 1 Dall. (U. S.) 9; Colclough v. Smith, 15 Ir. Ch. 347; Rex v. Wedge, 5 C. & P. 298. Cf. Rex v. Hayes, 2 Cox C. C. 226; Rogers v. Coal Co. (Ala., 1893), 12 S. Rep. 81. Age generally must be proved, and cannot be determined by the jury from the appearance of a person. Stephenson v. State, 28 Ind. 272; State v. Arnold, 13 Ired. 184.

⁴ McGoon v. Irvin, 1 Pinney (Wis.), 526.

his own knowledge, no question can arise as to the original character of the evidence, and though the circumstances may be only remotely connected with the main fact, yet, if relevant at all, it cannot be objected that such evidence is hearsay.¹ Upon the same principle the declarations of a person are admitted as evidence because of their connection with and relevancy to the principal fact by virtue of what is termed the rule of the *res gestæ*.²

§ 55. Requisites.—These declarations are not hearsay evidence. They are original evidence connected with the main facts in issue and from which the truth or untruthfulness of such facts may be inferred.³ To render such declarations admissible as original evidence they must possess, besides relevancy, three other characteristics, viz.: *First*, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing; *second*, they must qualify, illustrate, explain or unfold its nature or meaning, so as, *thirdly*, to be connected with it in such a way that the declaration and the act will form but a single transaction.⁴

§ 56. Must be illustrative of and connected with main transaction.—The range of events included by the term *res gestæ* varies according to the circumstances of each particular case. The principle upon which these declarations are admitted is their spontaneous and undesigned character and their explanatory or illustrative value in conjunction with the main event.⁵

¹ See 1 Greenl. on Evid., § 108.

² Graves v. People (Colo., 1893), 32 Pac. Rep. 63.

³ 1 Greenl. on Evid., § 108.

⁴ 1 Greenl. on Evid., § 108; Sterling v. Buckingham, 46 Conn. 464.

⁵ Travellers' Ins. Co. v. Sheppard, 85 Ga. 751; Glass v. Bennett (Tenn., 1890), 14 S. W. Rep. 1085; Bank v. Kennedy, 17 Wall. 19, 23, 24; Richmond, etc. Co. v. Hammond (Ala., 1890), 9 S. Rep. 577; Koetler v. Man. Ry. Co., 59 Hun, 623; United States v. Noelke, 17 Blatchf. 570; King v. King, 42 Mo. App. 454; Edwards v. Watertown, 59 Hun, 620; Powers v.

People, 42 Ill. App. 427; Beaver v. Taylor, 1 Wall. 642; Hewitt v. Eisenbart, 55 N. W. Rep. 252; Missouri, etc. Co. v. Bond (Tex., 1893), 20 S. W. Rep. 930; Missouri, etc. Co. v. Baier (Neb., 1893), 55 N. W. Rep. 913; Poole v. East Tenn. etc. Co. (Ga., 1893), 17 S. E. Rep. 267; Kane v. Troy, 48 Hun, 619; Sistare v. Hecksher, 63 Hun, 634; Hermes v. Chicago, etc. Co., 80 Wis. 590; Brooks v. Duggan, 149 Mass. 396; Schlemmer v. State, 51 N. J. L. 29; Fellows v. Williamson, 1 M. & M. 306; Hunter v. State, 11 Vroom, 495.

It is impossible to lay down any general rule upon the question of what declarations do or do not constitute a part of the *res gestæ*. The main points to be considered are the explanatory character of the declaration under the particular circumstances which are in litigation. Accordingly, where it is sought to show that a certain relationship existed between persons or to ascertain the feeling toward each other of those who have been connected by social or other ties, evidence of the declarations, spoken or written, of the parties involved is admissible as a part of the *res gestæ*.¹ But declarations forming a part of the *res gestæ* are only relevant where the act itself is equivocal or when its nature or motive is doubtful and the statements of the party are invoked to make his act or intention clear and easy to be understood.² Thus where the intention or purpose of a corporative³ or individual act,⁴ or a question of domicile,⁵ is involved, the resolutions of the corporation or the declaration of the person about to change his domicile, or while absent from it, if precisely contemporaneous with it and explanatory of the act, are admissible.

Where, as for example in the trial of an indictment for murder, the question of malice or premeditation is raised, the statements of the accused, constituting often the only evidence procurable of his mental condition, are admissible to show whether the killing was deliberate or under the sudden impulse of fear or anger.⁶

¹ *Peyser v. Myers*, 63 Hun. 634 (proof of partnership).

² *Holmes v. Goldsmith*, 147 U. S. 150; *Railroad Co. v. Clowdis* (Ga., 1893), 17 S. E. Rep. 88; *Nutting v. Page*, 4 Gray, 584.

³ *Baker v. Maloney* (Tex.), 4 S. W. Rep. 469; *Clever v. Hilberry*, 116 Pa. St. 431; *Wiley v. Athol*, 150 Mass. 430; *McLeod v. Ginter*, 80 Ky. 403.

⁴ *Chattanooga Co. v. Clowdis* (Ga., 1893), 17 S. E. Rep. 88; *Young v. Board of Mahoning County*, 51 Fed. Rep. 585; *Rudd v. Rounds*, 64 Vt. 432; *Lake Shore, etc. Co. v. Herrick* (Ohio, 1892), 29 N. E. Rep. 1052; *St. Louis, etc. Co. v. Murray*, 55 Ark. 248; *Calderon v. O'Donahue*, 47 Fed. Rep. 39; *Small v. Williams*, 87 Ga. 681; *Gor-*

ham v. Canton, 5 Me. 266; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 408.

⁵ *Ayer v. Weeks*, 65 N. H. 248; *Besch v. Beach*, 27 Tex. 290; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Jennison v. Hapgood*, 10 Pick. 77; *Burgess v. Clark*, 3 Ind. 250; *Marsh v. Davis*, 24 Vt. 363; *College v. Gore*, 15 Pick. 372; *Ennis v. Smith*, 14 How. (U. S.) 400, 421; *Fulham v. Howe*, 60 Vt. 351; *Richmond v. Thomaston*, 38 Me. 232; *Dupuy v. Wurtz*, 53 N. Y. 556; *Gilman v. Gilman*, 52 Me. 165; *Thorndike v. Boston*, 1 Met. 242.

⁶ *Gantier v. State* (Tex., 1893), 21 S. W. Rep. 255; *Miller v. State*, 31 Tex. Crim. App. 109; §§ 51, 52; *State v. Walker*, 77 Me. 490.

§ 57. Declarations must be contemporaneous or nearly so. The necessity for the contemporaneous character of the declarations has been much discussed, but it is impossible to lay down any rule which will be applicable to all cases. In one instance¹ an exclamation uttered only a few moments after a person had been assaulted, and while she was seeking to escape, was held inadmissible because not contemporaneous with the main transaction.

Though the majority of the American decisions, however, do not require that the act and the declarations should be precisely contemporaneous provided they are otherwise connected, in many of the states the strict English doctrine is adhered to.² Their unpremeditated and spontaneous character being the main ground for their reception, it is clear on the whole that, where any interval has elapsed between the act and the declaration, the likelihood that the declarant has taken advice or considered what he should say would have a bearing on their exclusion.³ It has been repeatedly held that, when a single day had intervened, the declaration was not admissible.⁴ But where the declaration was made soon after the event with which it was connected, it is admissible,⁵ pro-

¹ Reg. v. Bedingfield, 14 Cox's Cr. Cas. 341.

² United States v. Noelke, 17 Blatchf. 570; United States v. Angell, 11 Fed. Rep. 41; State v. Moore (Mo., 1893), 22 S. W. Rep. 1086; State v. Mason, 112 Mo. 374; Penn. Ry. Co. v. Lyons, 129 Pa. St. 113; Lewke v. D. D. E. B. etc. Co., 46 Hun, 283; Texas, etc. Co. v. Barron, 78 Tex. 421; Dwyer v. Bassett, 1 Tex. Civ. App. 513; Evans v. State (Ark., 1893), 22 S. W. Rep. 1026; State v. Raven (Mo., 1893), 22 S. W. Rep. 376; State v. Daugherty, 17 Nev. 376; Ohio, etc. Co. v. Cullison, 40 Ill. App. 67; Texas, etc. Co. v. Robertson, 82 Tex. 657; Mayes v. State, 64 Miss. 329; State v. Frazier, 1 Houst. (Del.) 176; Jones v. State, 71 Ind. 66; Gulf, etc. Co. v. York, 74 Tex. 374; 12 S. W. Rep. 68; Wormsdorf v. Detroit City R. Co.,

75 Mich. 472; Durham v. Shannon, 116 Ind. 403.

³ Goff v. Bank, 47 N. W. Rep. 190.

⁴ Noyes v. White, 19 Conn. 250; Montgomery v. McGuire, 25 Ill. App. 31; Ft. Smith Oil Co. v. Slover (Ark., 1894), 24 S. W. Rep. 106; Short v. N. Pac. El. Co., 45 N. W. Rep. 706; Southerland v. W. & W. R. Co., 11 S. E. Rep. 189; 106 N. C. 100; Corinth v. Lincoln, 34 Me. 310.

⁵ Harriman v. Stowe, 57 Mo. 93; Insurance Co. v. Mosley, 8 Wall. (U. S.) 397; Hanna v. Hanna (Tex., 1893), 21 S. W. Rep. 720; Chapin v. Cambria Iron Co., 145 Pa. St. 478; Butler v. Manhattan Ry. Co., 24 N. Y. S. 442; Miss. Pac. Ry. Co. v. Baier (Neb., 1893), 55 N. W. Rep. 913; Ohio & M. Ry. Co. v. Stern (Ind., 1892), 31 N. E. Rep. 180; Jewel v. Jewel, 1 How. (U. S.) 219; Penn. R. Co. v.

vided a period, however short, has not elapsed which would give an opportunity for deliberation.¹

§ 58. Entries a part of the *res gestæ* and made by third persons.— Sometimes entries made by third parties in books of record or account, or letters and telegrams sent by them, are original and primary evidence, even though the parties themselves be not called. Entries are divided into public and private. The former are those made by a public official in the course of his public duties. The latter are made by private persons in the exercise of their commercial or professional callings.

To render entries made by a third party admissible as original evidence, they must possess substantially the characteristics requisite in the case of verbal declarations which are a part of the *res gestæ*.

The general rule is that, whether the entry or writing be one that is made in the performance of an official, professional or private duty, the party must have been legally authorized to make it and it must have been made in the course of business.² So the writing itself must be relevant to the transac-

Lyons, 18 Atl. Rep. 759; 129 Pa. St. 113; *Lewke v. D. D. E. B. & B. R. Co.*, 46 Hun, 283; *Thomas v. Herrall*, 18 Oreg. 546; *Insurance Co. v. Shepard*, 85 Ga. 751; *Stevens v. Castel*, 63 Mich. 118.

¹ *Durkee v. Cent. P. Ry. Co.*, 69 Cal. 533; *Tennis v. Railway Co.* (Kan., 1891), 25 Pac. Rep. 876. "The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them when they appear to have been made under the immediate influence of the principal transaction and are so connected with it as to characterize or explain it. What time may elapse between the happening of the event and the time of the declaration, and the declaration be yet admissible, must depend upon the character of the transaction itself. The admissibility

of a declaration in connection with evidence of the principal fact, as stated by Mr. Greenleaf, must be determined by the judge according to the degree of its relation to the fact and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, he adds, whether the declaration was contemporaneous with the main fact and so connected with it as to illustrate its character." *Vicksburg & Meridian R. Co. v. O'Brien*, 119 U. S. 99, 105-6.

² *Rollins v. United States*, 23 Ct. Cl. 106 (official letter); *McDonald v. Carnes*, 7 S. Rep. 919; 90 Ala. 147; *State v. Martin*, 15 S. W. Rep. 529; *Cobb v. Malone*, 86 Ala. 571; 8 S. Rep. 693; *Bolling v. Fannin* (Ala., 1893), 12 S. Rep. 59; *Webster v. Webster*, 1 F. & F. 401.

tion with which it is sought to be connected, and must relate to and be contemporaneous with it and be illustrative of it.¹ It is also required that the person who is the author of the entry or writing should have been in a position where he would have peculiar opportunities of possessing a knowledge of the occurrence to which the entry relates, and that, having such knowledge, he must also have been impartial and without apparent motive to deceive by fabricating evidence or perverting the circumstance described.² These requirements being met, the writings are admissible as original evidence, and though the party, if living and if he can be found, should be called to testify, yet his non-production or incompetency as a witness³ will not render the entries or writing hearsay evidence.⁴ A foundation for the introduction of the entries or documents must be laid by testimony which will serve to identify them and show their contemporaneous character as a part of the *res gestæ*.⁵

The rule under consideration is of very extensive usefulness and application. Under it not only are books of account and public records kept by third persons admitted as original

¹ Stallings v. Hallum, 79 Tex. 421; Baldridge v. Penland, 68 Tex. 441; Cont. Ins. Co. v. Insurance Co., 51 Fed. Rep. 884; Lassone v. Boston & L. R. Co. (N. H., 1893), 24 Atl. Rep. 902; Lewis v. Meginnis, 30 Fla. 419; Bolling v. Fanning (Ala., 1893), 12 S. Rep. 59; Farrington v. Hayes (Vt., 1893), 25 Atl. Rep. 1091; Livingston's Appeal (Conn., 1893), 26 Atl. Rep. 470.

² Welch v. Barrett, 15 Mass. 380; Bank v. Whitehill, 16 S. & R. 89; Davis v. Fuller, 12 Vt. 178; Nichols v. Webb, 8 Wheat. 326; Brewster v. Doan, 2 Hill, 537; Hart v. Kendall, 82 Ala. 144; Kansas, etc. Co. v. Smith, 90 Ala. 25; McVey v. Durkin, 136 Pa. St. 418. Entries made by a bank messenger or notary public in books ordinarily kept by such persons are admissible in an action on a promissory note to show that payment has been demanded and that the

indorser has received notice of protest for non-payment. Welch v. Barrett, 15 Mass. 380; Halliday v. Martinett, 20 Johns. 168; Bank v. Mitchell, 15 Conn. 206; Nichols v. Webb, 8 Wheat. 326; Nichols v. Goldsmith, 7 Wend. 360; Sherman v. Crosby, 11 Johns. 70; Sherman v. Atkins, 4 Pick. 283; Hart v. Kendall, 82 Ala. 144, cited in 1 Greenl. on Evid., § 114.

³ Augusta v. Windsor, 19 Me. 317; Nichols v. Webb, 8 Wheat. 326.

⁴ But see St. Louis, etc. Co. v. Henderson (Ark., 1893), 21 S. W. Rep. 873.

⁵ Meconce v. Mower, 37 Kan. 298; 15 Pac. Rep. 155; Fowler v. Schafer, 32 N. W. Rep. 292; Stallings v. Gottschalk (Md., 1893), 26 Atl. Rep. 524; Healey v. Bauer, 65 Hun, 621; Livingston's Appeal (Conn., 1893), 26 Atl. Rep. 470; Farrington v. Hayes (Vt., 1893), 25 Atl. Rep. 1091.

evidence,¹ but private books,² photographs,³ maps and surveys have also been received.⁴ Thus an entry made in the diary of a surgeon who was present in a professional capacity at the birth of a person is admissible when the exact date of that event is in issue.⁵ Though a certificate of a person's baptism is inadmissible to show the date of his birth,⁶ yet his baptism may be shown by the entry made at the time according to the rules of the church by the priest who baptized him, where the entry was made as a part of the ceremony, though the book in which it was made was not required to be kept.⁷ From these instances it will be seen that the rule by which such entries are admitted as original evidence of the occurrence which they record and of which they form a part is not confined to records of a public character.

In very many cases private entries and writings, such as receipts, indorsements of service on legal process,⁸ and press copies of letters, have been received when the party who made them was dead or for other reasons could not be produced, and it was shown that the party was impartial, and, having competent knowledge, had made a true and accurate record of the transaction.⁹

§ 59. Entries against interest and entries which are a part of the *res gestæ* distinguished.—Entries and writings

¹ *Bell v. Kendrick* (Fla., 1890), 6 S. Rep. 868. See *post*, §§ 142a-160.

² *Chenango Corp. v. Lewis*, 63 Barb. (N. Y.) 111.

³ *Mississippi, etc. Co. v. Moore*, 15 S. W. Rep. 714; *Kansas, etc. Co. v. Smith*, 90 Ala. 25; 8 S. Rep. 43. See § 38.

⁴ *Ewing v. State*, 81 Tex. 172; *Rowland v. McCowan*, 20 Oregon, 538; 26 Pac. Rep. 853; *McVey v. Durkin*, 136 Pa. St. 416; *Weld v. Brooks*, 25 N. E. Rep. 719; 152 Mass. 297. See *post*, § 145.

⁵ *Higham v. Ridgway*, 10 East, 109.

⁶ *Lavin v. Aid Society*, 74 Wis. 349. *Contra*, *Jacobi v. Order of Germania*, 26 N. Y. S. 318.

⁷ *Hunt v. Order of Chosen Friends*, 64 Mich. 671; 31 N. W. Rep. 576; *Kabok v. L. I. Ins. Co.*, 4 N. Y. S.

718; *Kennedy v. Doyle*, 10 Allen (Mass.), 161; *Witcher v. McLaughlin*, 115 Mass. 167; *McGuirk v. Mut. L. Ins. Co.*, 66 Hun, 628. The register of a parish kept by its priest is admissible to prove a marriage solemnized by him if regularly kept and if it shows the facts which are essential to constitute a valid marriage contract. *State v. Doris*, 40 Conn. 145; *Erwin v. English*, 61 id. 502; 23 Atl. Rep. 753; *Jacobi v. Order of Germania*, 26 N. Y. S. 318.

⁸ See *post*, § 150a; *Stapylton v. Clough*, 2 El. & Bl. 933.

⁹ *De Arnold v. Neasmith*, 32 Mich. 231; *Steubing v. New York EL. R. Co.*, 19 N. Y. S. 313; *Gould v. Conway*, 59 Barb. (N. Y.) 355; *Bank v. Mitchell*, 15 Conn. 206.

or declarations made by persons who are not parties to the suit which are admissible as evidence because they are concomitant of the main transaction and form a part of it should be distinguished from those which are admissible solely because they are against the interest of the declarant. The former are original evidence forming a part of the *res gestæ*, and the fact that they were made, rather than their truth or falsity, is the main fact to be shown. Hence the fact that the declarant is alive or dead, or the fact that he is interested or the amount of his interest in making the entry or declaration, has no material bearing on the admissibility of such statements, although his interest may be considered by the jury in estimating the weight or credit which they may attach to such entries.¹ But in the latter class of declarations the primary fact that they are against interest is never to be lost sight of; nor should it be forgotten that these declarations, constituting not original evidence but an exception to the rule rejecting hearsay, are introduced to substantiate the truth of the facts asserted in them, and not merely to show that they were uttered at the date of the transaction in issue.²

§ 60. A party's own books are evidence.— Upon the question whether entries made in the books of a party to the suit are admissible as evidence in his own favor under the proposition that such entries constitute a part of the *res gestæ*, the cases are at considerable variance. If the entry was made by an employee of the party having personal knowledge of the facts, in the usual course of his employment, in books which were kept for such entries, and if it was made at or near the date of the transaction and is illustrative of it, then there can be no objection to its admission upon the principles already laid down. It is really hearsay evidence, however, because the book-keeper or other person making the entry was not on oath or cannot be produced, or, being produced, has wholly forgotten the circumstances attending the transaction.³

¹ §§ 117, 118.

· Ross v. Brusie, 11 Pac. Rep. 760;

² 1 Greenl. on Evid., §§ 120, 147.

70 Cal. 465; Moore v. Knott, 14 Oreg.

³ Schuckman v. Winterbottom, 9 N. Y. S. 733; Hancock v. Kelly, 2 S. Rep. 281; 81 Ala. 368; Brower v. East Rome Town Co., 84 Ga. 219; 339; Barnes v. Dow, 59 Vt. 530;

At common law, partly from the necessity of the case because of the incompetency of a party to testify as a witness, entries made by him personally in his own books were considered admissible as evidence forming a part of the *res gestæ*.¹ But to render them admissible it must be affirmatively shown that the books are books of first or original entry, were regularly kept in the course of business, and that no other books of account bearing upon the same transaction were kept at that time. The entries must have been made at the time they purport to have been made and contemporaneously with the transactions they describe or to which they refer. If the entry be made by a party to the action himself, it must also be shown that he had no book-keeper or clerk whose regular duty it was to make such entries, and that he (the party) was present at the time of the transaction.² The formal character of the books, whether ledgers or sales-books, is immaterial so far as their admissibility is concerned, if it be shown that they

Lewis v. Meginnis, 30 Fla. 419; Kuh v. Michigan Bank, 93 Mich. 511; Goff v. State Bank (Wis., 1893), 54 N. W. Rep. 732; Bedford v. Sherman, 68 Hun, 317; Morris v. Morton, 20 S. W. Rep. 287; Johnson v. Culver, 116 Ind. 273; Culver v. Marks, 122 id. 554. A promise to pay for the goods charged cannot be proven by an entry in a party's books. Somers v. Wright, 114 Mass. 171; Keithe v. Kibbe, 10 Cush. (Mass.) 35. But a credit may be proven by the party giving it. Ross v. Brusie, 70 Cal. 465.

¹ Entries in the diaries or account books of physicians and attorneys have been held competent to prove the value of services rendered by them. Codmon v. Caldwell, 31 Me. 560; Bay v. Cook, 22 N. J. L. 343; Murphy v. Gates (Wis., 1892), 51 N. W. Rep. 573. *Contra*, Hale's Ex'rs v. Ard, 48 Pa. St. 22; Briggs v. Georgia, 15 Vt. 61.

² Alling v. Brazee, 27 Ill. App. 595; Watrous v. Cunningham, 11 Pac. Rep. 811; 71 Cal. 30; Cogswell v.

Dolliver, 2 Mass. 217; White v. Whitney, 82 Cal. 163; Burnham v. Adams, 5 Vt. 313; Barnes v. Dow, 59 id. 230; Prince v. Smith, 4 Mass. 455; Mathes v. Robinson, 8 Met. 269; Rexford v. Comstock, 3 N. Y. S. 876; Rodman v. Hoops, 1 Dall. 85; Setchers v. Keigwin, 57 Conn. 573; Smith v. Rentz, 131 Pa. St. 169; Cormac v. Western White Bronze Co., 77 Iowa, 32; Roberts' Appeal, 26 Pa. St. 102; Doty v. Smith, 68 Hun, 199. Where the entries are in the handwriting of a party, the delivery of the goods thus charged must be shown by independent evidence. Baldridge v. Penland, 68 Tex. 441; 4 S. W. Rep. 565. The admissibility of a party's own entries is for the court. Pratt v. White, 132 Mass. 477. An entry made personally by a party has been held inadmissible to prove a debt (Doty v. Smith, 68 Hun, 199), even though supplemented by his oath. Sauter v. Carroll, 11 Pa. Co. Ct. R. 192.

were fairly and honestly kept, are books of original entry, and are free from material alterations, interlineations or other circumstances calculated to arouse a suspicion.¹

When the books of original entry of a party are produced as evidence in his favor, it is necessary that they should be supplemented by his oath as to the main transaction involved. Thus, if the book entry relates to a sale of goods, the party will be called upon to swear that the sale was actually made and the goods delivered, although the details of the transaction — as, for example, the quantities and prices charged — may have to be gathered from the written entry.²

In a suit brought by an executor or administrator, the books of the decedent are still admissible as evidence under the conditions above outlined. Of course the absence of the oath of the party who has made the entry may detract from its evidential force, and in such circumstances his personal representative should be called upon to show, so far as he knows the books are the actual books of deceased, that the entries are original and contemporaneous³ and any other facts necessary to lay a foundation for the admission of such evidence. So the handwriting of the party who has made the entry must be proven.⁴ The same principles apply where the party is a lunatic, if that fact and the identity of the handwriting be shown.⁵ A party's own entries are not universally admissible in his favor at common law, and in many instances where they have become admissible their admission is founded on the necessity of the case and is due to a statutory modifica-

¹ *Lewis v. Meginnis*, 30 Fla. 419; *Goodwin v. O'Brien*, 6 N. Y. S. 239; *Rexford v. Comstock*, 3 N. Y. S. 876; *Vaugh v. Strong*, 4 N. Y. S. 689; *Alling v. Wenzel*, 27 Ill. App. 511; *Churchman v. Smith*, 6 Whart. 106; *Hancock v. Flynn*, 8 N. Y. S. 133; *White v. Whitney*, 22 Pac. Rep. 1188; 82 Cal. 163. In *Stuckslager v. Neel*, 123 Pa. St. 60, it was held that a party's books are not admissible to prove the sale of an article not dealt in by him in the usual course of business. So in *Baldrige v. Penland*, 68 Tex. 441; 4 S. W. Rep. 565.

² *Baldrige v. Penland*, 66 Tex. 441; *Dwinel v. Pottle*, 3 Me. 167; *Painer v. Hodge*, 71 N. Y. 598; *Guy v. Mead*, 22 id. 462.

³ *Pratt v. White*, 132 Mass. 478; *Davis v. Sanford*, 9 Allen, 216.

⁴ *Kinney v. United States*, 54 Fed. Rep. 312; *McLellan v. Crofton*, 6 Greenl. 307; *Chipman v. Kellogg*, 60 Mich. 438. *Contra*, *Bowers v. Overfield*, 10 Pa. Co. Ct. R. 273.

⁵ *Holbrook v. Gay*, 6 Cush. 215. See 1 *Smith's Lead. Cases*, 139, note to case of *Price v. Tarrington*.

tion of the common law, and not entirely to the fact that the entries constitute a part of the *res gestæ*.

A full discussion of the statutory rules being impossible here, the reader is referred to the cases cited in the notes and to the statutes of his own state for a further elucidation of the subject.¹

Books of account not regularly kept, or in which only a few or only occasional entries are made, are not admissible.² But the circumstance that a party's books are largely in the handwriting of some third person is immaterial.³ Testimony of this sort, in order to be admissible, must be contained in books of original entry, though upon the question what shall constitute a book of original entry the courts are by no means harmonious.⁴ If books are kept regularly, so that the memoranda or slips upon which the earliest entries are made are immediately transcribed into the books of account, then the

¹ 1 Greenl. on Evid., § 118, citing *Vosburg v. Thayer*, 12 Johns. 261; *Prince v. Smith*, 4 Mass. 455; *Burns v. Fay*, 14 Pick. 8; *Richards v. Howard*, 2 Nott. & McC. 474; *Winsor v. Dillaway*, 4 Met. 221; *Kerr v. Love*, 1 Wash. 172; *Lonergan v. Whitehead*, 10 Watts, 249; *Newton v. Higgins*, 2 Vt. 366; *Dunn v. Whitney*, 10 Me. 9; *Green v. Pratt*, 11 Conn. 205; *Prest v. Mersereau*, 10 N. J. L. 268; *Ganther v. Jenks*, 76 Mich. 510; *In re Simpson*, 5 N. Y. S. 868; *Watrous v. Cunningham*, 71 Cal. 32; *Rumsey v. N. Y. & N. J. Tel. Co.*, 49 N. J. L. 323; *Roche v. Ware*, 71 Cal. 375; *Setchel v. Keigwin*, 57 Conn. 478; *Green v. Mill*, 60 Vt. 442; *Woolsey v. Bohn*, 41 Minn. 237; *Alling v. Wenzel*, 27 Ill. App. 516. In *Missouri* a party's books are not admissible in his favor. *Nipper v. Jones*, 27 Mo. App. 558.

² *Nat. Ulster Co. Bank v. Madden*, 114 N. Y. 280; *Kibbe v. Bancroft*, 17 Ill. 18; *Goddling v. Orcutt*, 44 Vt. 54; *Korwitz v. Wright*, 37 Tex. 82; *McNulty's Appeal*, 135 Pa. St. 210.

³ *Vosburgh v. Thayer*, 12 Johns. 461; *Young v. Luce*, 66 Hun, 631. Entries in a depositor's pass-book are not admissible in a suit by the bank against a third person, as the book is not a book of original entry. *Wills Pt. Bank v. Bates*, 72 Tex. 137. But *contra* in *Kux v. Central M. Sav. Bank*, 93 Mich. 511; *Goff v. Stoughton St. Bank*, 54 N. W. Rep. 732, where the suit was by the depositor against the bank.

⁴ Where it is sought to prove a charge or debt, mere memoranda, such as would be made upon the stubs of a check-book or in an order-book, are not admissible. *Flood v. Mitchell*, 68 N. Y. 507; *Moore v. Meacham*, 10 id. 207; *Cooper v. Morrell*, 4 Yeates, 341. But a bank check drawn by a decedent is admissible in an action against his estate to show payments made by him to the plaintiff. *Jesse v. Davis*, 34 Mo. App. 341. If the book is mutilated it may be excluded. *Lovelock v. Gregg*, 14 Colo. 53.

latter of course become books of original entry and are unobjectionable.¹ But where the books are written up at short and regular intervals — as, for example, at the close of each day's business, or on the following day — from written memoranda made at the precise time of the transaction, the books cannot be rejected because of an alleged lack of originality.²

The principle of law that in the case of an entry made by an employee in the party's own books the employee must have a personal knowledge of the facts he records has been somewhat modified from necessity where numerous entries involving many details are in question. Thus in large commercial undertakings, where many laborers are employed or where very many sales and deliveries of goods are made, it is not possible for the book-keeper to have a personal knowledge of every transaction, and he is compelled to rely upon a fellow-servant, as a time-keeper or salesman, for his information. Such entries, made in the course of business, are admissible if corroborated by the evidence of both employees to the effect that they made true and accurate reports and entries in the course of the performance of their duty to the master.³ The entry need not be a complete statement of the transac-

¹ So a book into which entries were regularly made from way-bills by the freight agent is admissible without producing the bills. *Robinson v. Mulder*, 81 Mich. 75.

² *Walter v. Bolman*, 8 Watts, 544; *Boggan v. Horn*, 97 N. C. 268; *Lurren v. Crawford*, 4 S. & R. 3, 5; *Woolsey v. Boon*, 41 Minn. 235; *Faxon v. Hollis*, 13 Mass. 427; *Taylor v. Davis* (Wis., 1892), 52 N. W. Rep. 756; *Patton v. Ryan*, 4 Rawle, 408; *Hartley v. Brooks*, 6 Whart. 189; *Moses v. Penquit*, 82 Ala. 370; 34 N. W. Rep. 445; *Stroud v. Tilton*, 4 Abb. (N. Y.) App. 324; *Jeffries v. Urmy*, 3 Houst. (Del.) 653; *Barker v. Haskell*, 9 Cush. (Mass.) 218; *Kent v. Garvin*, 1 Gray (Mass.), 148; *Hall v. Glidden*, 39 Me. 445; *Powers v. Savin*, 28 Abb. N. C. 463. *Contra*, *Robertson v. Reed*, 38 Mo. App. 32.

But a ledger is not a book of original entry. *Jilmar v. Schell*, 35 N. Y. Sup. Ct. 67; *Lawhorn v. Carter*, 11 Bush (Ky.), 7.

³ *New York City v. Second Av. R. Co.*, 102 N. Y. 579; *Nat. Ulster Bank v. Madden*, 114 id. 283; *Bedford v. Sherman*, 68 How. 312; *Rudd v. Robinson*, 7 N. Y. S. 535; *Young v. Luce*, 66 How. 631; *Morris v. Morton* (Ky., 1893), 20 S. W. Rep. 287; *Taylor v. Davis* (Wis., 1892), 52 N. W. Rep. 756; *Nelson v. New York*, 131 N. Y. 4. The circumstance that defendant has recognized the accuracy of the books of the plaintiff in transactions with other persons is material as bearing on their admissibility. *West v. Van Tuyl*, 119 N. Y. 620; *Pub. Ass'n v. Fisher* (Mich., 1893), 54 N. W. Rep. 759.

tion, for books which only contain marks, signs or figures are admissible, provided there is other evidence which will render these entries intelligible and show their explanatory connection with the main transaction.¹ So the fact that the account is kept by notches cut in a stick,² or is marked on a slate³ or board with a piece of chalk,⁴ will not render the book into which it is transferred inadmissible. So the fact that a written entry is in cipher will not cause its exclusion.⁵

Mere memoranda of transactions in dispute, made in books or on loose papers, made for the purpose not of charging either party, but merely to aid the memory of the person making them, are not, it has been sometimes held, admissible as independent evidence, but may be read by the witness to refresh his memory. He will then be required to testify of his own knowledge to the facts and transactions which are contained in his memoranda.⁶

§ 61. Indorsements as part of the *res gestæ*.—Under the rule of the *res gestæ* is included the acknowledgment of a partial payment indorsed by the holder of negotiable paper upon the note or other security. Such an indorsement, tending to show payment by the creditor or maker of the negotiable paper, is admissible evidence of his acknowledgment of the debt, and the effect of such part payment may be to prevent the note from being barred by the statute of limitation. If, therefore, a note so indorsed be offered in evidence, it will be presumed, in the absence of circumstances to the contrary, that the receipt was indorsed at the time of the payment according to the ordinary and well-recognized mercantile custom, and that the payment was actually made.⁷ The indorse-

¹ Miller v. Shay, 145 Mass. 162; 13 N. E. Rep. 468; Springs v. Schenck, 106 N. C. 153; Pratt v. White, 132 Mass. 477.

² Kendall v. Field, 14 Me. 30.

³ Faxon v. Hollis, 13 Mass. 42; Kendall v. Field, 14 Me. 30.

⁴ Smith v. Sanford, 12 Pick. 139; Pallman v. Smith (Pa., 1890), 19 Atl. Rep. 891; Crane Lumber Co. v. Otter Creek Lumber Co. (Mich., 1890), 44 N. W. Rep. 788; Barker v. Haskell, 9 Cush. 218.

⁵ Monroe v. Snow, 131 Ill. 126.

⁶ Bonnett v. Glatfeldt, 120 Ill. 166; Baum v. Reay, 96 Cal. 642; Bates v. Sabin, 64 Vt. 511; Bates v. Preble (U. S., 1894), 12 S. Ct. 277; Whitaker v. White, 69 Hun, 288; Cunard v. Manhattan, 1 Misc. Rep. 151. See *post*, §§ 337, 338.

⁷ Nichols v. Webb, 8 Wheat. 326; Whitney v. Bigelow, 4 Pick. 110; Manson v. Lancey, 84 Me. 339; Gibson v. Peebles, 2 McCord, 418.

ment thus being a part of the *res gestæ*, i. e., the act of payment, it is admissible as original evidence for the creditor to show an acknowledgment of the debt by the debtor.¹ When, however, the statute *has* run upon the instrument, a subsequent indorsement by the creditor purporting to show a part payment by the debtor will be to so large a degree in the interest of the former that no presumption of payment will arise. Under these circumstances he will be compelled to prove actual payment by evidence extrinsic to this indorsement.²

¹ *McCrillis v. Millard*, 24 Atl. Rep. 576; 17 R. I. 724; *Oughterson v. boom v. Billington*, 17 Johns. 182; *In re Clapsaddle*, 24 N. Y. S. 313; *Clark*, 65 Hun, 624. 4 Misc. Rep. 355.

² 1 Greenl. on Evid., § 121; *Rose-*

CHAPTER V.

ADMISSIONS.

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| <p>§ 65. Definition and character.</p> <p>66. Privy as affecting admissions.</p> <p>67. Parties whose admission is received — Joint interest, when required.</p> <p>68. Admissions of partners — Their effect after dissolution.</p> <p>69. Declarations of conspirators.</p> <p>70. Assignor and assignee.</p> <p>71. Wife's admission — When binding on husband.</p> <p>72. Admissions of inhabitants of towns.</p> <p>73. Admissions of strangers to the record — Principal and surety — Admissions of real parties.</p> <p>73a. The declarations of agents.</p> <p>74. Admissions by attorneys of record.</p> | <p>§ 75. Offers of compromise — Admissions under duress against interest.</p> <p>76. Admissions in pleadings.</p> <p>77. Admissions by reference — Awards.</p> <p>78. Admissions from conduct and assumed character.</p> <p>79. Self-serving declarations.</p> <p>80. Mode of proof — Nature of the admissions.</p> <p>81. Weight and sufficiency of admissions.</p> <p>82. Admissions, when conclusive — Mistake.</p> <p>83. Estoppel defined.</p> <p>84. Intention of party estopped.</p> <p>85. Admissions and communications sent and received by telephone.</p> |
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§ 65. **Definition and character.**— An admission is a concession or voluntary acknowledgment made by a party of the existence or truth of certain facts.¹ The reception of admissions as evidence constitutes an exception to the rejection of hearsay evidence and depends upon well-recognized principles of justice and of public policy by which men are prevented from taking advantage of their acts or statements intended to promote their own interests without being compelled to assume full responsibility for them so far as they control or even influence the affairs of other men. The facts to which the admission made by a party refers are peculiarly within his own knowledge. This circumstance, with the indisposition of men to admit things which are against their interests, lends weight and credibility to this description of evidence.

The word "admissions" is confined to statements made or

¹ Bouvier's Law Dict.

conduct occurring in transactions not criminal, and, for convenience sake, they may be divided into direct, *i. e.*, express admissions, incidental admissions, and implied admissions.

In implied admissions are included all those that may be inferred from the conduct or character of the party, from his act or omission, or from his acquiescence and silence under circumstances where it is his duty to speak or act.¹

The form of the declaration is not material if its terms are clear and binding upon the party making them or upon those in privity with him. Thus, where defendant made statements over a telephone, the witness was permitted to give evidence of them upon his testifying that he knew and could distinguish defendant's voice.²

§ 66. Privity as affecting admissions.—By privity is meant a mutual or successive relationship to the same rights of property,³ and this relationship presupposes such an identity of interest that the admission of one privity is by the law regarded as the admission of all the others.⁴ If a party has limited or qualified his own rights of enjoyment or ownership over property, it is only just that those who enjoy those rights concurrently with him, or who succeed to them, should in accepting the benefits be burdened with the disadvantages and responsibilities. Thus the declarations of the ancestor or of a testator or grantor in disparagement of the title by which he holds, made during the period he is owner of the property, are binding upon the heirs, executors or devisees or grantees respectively.⁵ But the declarations of a grantor of real property, made subsequent to the date on which he parted with his title, are never admissible against subsequent purchasers, even though the declarations refer to the condition and boundaries of the land as it was while he was the owner of it.⁶ So where a per-

¹ See §§ 18, 83.

² *Stapp v. State*, 31 Tex. Crim. App. 349.

³ Co. Lit. 271a; 1 Greenl. on Evid., § 189.

⁴ See *post*, §§ 68-73a.

⁵ *Leggat v. Leggat* (Mont., 1893), 33 Pac. Rep. 5; *Snow v. Starr*, 12 S. W. Rep. 673; 75 Tex. 411; *Pierce v. Robert*, 57 Conn. 31; *Hughes v. Boone*, 102 N. C. 137; *Mueller v. Rel-*

han, 94 Ill. 142; *Miller v. Ternane*, 50 N. J. L. 32; *Platner v. Platner*, 78 N. Y. 90; *Wood v. Fisk*, 62 N. H. 173; *Whitman v. Haywood*, 14 S. W. Rep. 166; 77 Tex. 157; *Lewis v. Adams*, 61 Ga. 549; *Stockwell v. Blamey*, 129 Mass. 312.

⁶ *Hills v. Ludwig*, 24 N. E. Rep. 596; 46 Ohio St. 513; *Casto v. Fry*, 10 S. E. Rep. 799; 33 W. Va. 449; *Bentley v. O'Brien*, 111 Ill. 53; *Taylor v. Dev-*

son admitted that he held the land as a tenant, his declaration will be binding upon his heir or devisee¹ in an action against the latter to recover the land.

The adverse and continuous character of one's possession may in like manner be shown by the declaration of a grantor on whose alleged title the plaintiff in ejectment founds his.² So where a question of boundary is concerned, the declarations of a former owner, made while in possession of the land, are always admissible against a subsequent purchaser.³

§ 67. Parties whose admission is received — Joint interest, when required.— The admissions of a party to the record or of one identified in interest with him are receivable against him, as a general rule. Though several persons may sue or be sued, the admission of one, though receivable against him, will not bind the others unless a joint interest or privity exists between them.⁴ A mere community of interest is not enough. But where the required joint interest exists, the admission of one of the parties, made in the prosecution of the common undertaking and within its scope, is receivable in evidence against any or all of his associates.⁵ So, because the neccs-

erell, 43 Kan. 469; Walker v. Cole (Tex., 1894), 24 S. W. Rep. 76. *Contra*, Hart v. Randolph (Ill., 1893), 32 N. E. Rep. 517.

¹ Fellows v. Smith, 130 Mass. 78.

² Alexander v. Caldwell, 55 Ala. 217; Stockton v. Staples (Cal., 1893), 32 Pac. Rep. 936; Hurley v. Lockett, 72 Tex. 262; Parrott v. Baker, 82 Ga. 364; Lawrence v. Wilson (Mass., 1894), 35 N. E. Rep. 858.

³ Wood v. Fiske, 62 N. H. 173; Whitman v. Haygood, 77 Tex. 557. "On a question of private boundary, declarations of a particular fact, as distinguished from reputation, made by a deceased person, are not admissible unless it is shown that such person had knowledge of that whereof he spoke, and was on the land or in possession of it when the declaration was made as part of the *res gestæ*." Hunnicutt v. Peyton, 102 U. S. 363, 364.

⁴ Petrie v. Williams, 68 Hun, 589; 23 N. Y. S. 237; Thompson v. Richards, 14 Mich. 172; State v. Ah Tom, 8 Nev. 213; Grace v. Nesbitt, 109 Mo. 3; Burnham v. Sweatt, 16 N. H. 418; Bensley v. Brockway, 27 Ill. App. 410; Dan v. Brown, 4 Cow. (N. Y.) 483; Lenhart v. Allen, 32 Pa. St. 312; McElroy v. Ludlum, 32 N. J. Eq. 828; Morris v. Nixon, 1 How. (U. S.) 118; Redding v. Wright, 49 Minn. 322; Leeds v. Marine Ins. Co., 2 Wheat. (U. S.) 380; Kiser v. Danenburg, 88 Ga. 541; Roberts v. Kendall, 3 Ind. App. 339; Thurman v. Blankenship-Blake Co., 79 Tex. 171.

⁵ See *post*, §§ 68, 69, 71, 73a; Collett v. Smith, 143 Mass. 473; Vankleck v. McClabe, 87 Mich. 599; 9 N. W. Rep. 872. *Cf.* Rich v. Flanders, 39 N. H. 304; Carson v. Gillitt, 2 N. D. 255; 50 N. W. Rep. 710; Webster v. Stearns, 44 N. H. 498; McKee v. Hamilton, 33 Ohio St. 7; Peyson

sary joint interest is lacking, it has been held that the admission of a tenant in common is not receivable against his fellow-tenants,¹ nor of an executor, trustee or administrator against those officially associated with him,² nor of an heir or devisee to bind the other heirs or devisees.³ So no joint interest exists between successive indorsers,⁴ or between a promisor and an executor of a co-promisor;⁵ between an administrator and an heir of the intestate;⁶ between remainderman and life-tenant;⁷ among co-underwriters;⁸ between the person assured and the beneficiary,⁹ or among directors¹⁰ or stockholders of a corporation¹¹ which will render the admission of one receivable as evidence against the others.¹²

v. Meyers, 63 Hun, 634; Lewis v. McGinnis, 30 Fla. 419; Mathews v. Herdtfelder, 15 N. Y. S. 165.

¹ Bryant v. Booze, 55 Ga. 438; McLellan v. Cox, 36 Me. 95; Page v. Swanton, 39 Me. 400; Dobson v. Kuhula, 66 Hun, 627; Lyons v. Pyatt (N. J., 1893), 26 Atl. Rep. 834; Ronnebaum v. Mt. Auburn Ry. Co., 29 Weekly L. Bul. 338; Talkin v. Anderson (Tex., 1892), 19 S. W. Rep. 350; Eakle v. Clark, 30 Md. 322; Dan v. Brown, 4 Cow. (N. J.) 483.

² Weyman v. Thompson, 25 Atl. Rep. 205; Dye v. Young, 55 Iowa, 433; McMillan v. McDill, 110 Ill. 47; Prewet v. Coopwood, 30 Miss. 369; Thompson v. Thompson, 13 Ohio St. 356; La Bau v. Vanderbilt, 3 Redf. (N. Y.) 384; Forney v. Terrell, 4 W. Va. 729; Hayes v. Burkam, 67 Ind. 359; Prewet v. Land, 36 Miss. 495; Hamberger v. Root, 6 W. & S. (Pa.) 431; Irwin v. West, 81 Pa. St. 157; Elwood v. Diefendorf, 5 Barb. 498.

³ Roberts v. Trawick, 13 Ala. 68; Berden v. Allen, 10 Ill. App. 91; Church v. Howard, 79 N. Y. 415; O'Conner v. Madison (Mich., 1894), 57 N. W. Rep. 105; Walkup v. Pratt, 5 Harr. & J. (Md.) 41; Hueston v. Hueston, 2 Ohio St. 488; Tinnern v. Hinz, 38 Hun (N. Y.), 465; Hamon v. Huntley, 4 Cow. (N. Y.) 493; Walker

v. Dunsbaugh, 20 N. Y. 170; Pease v. Phelps, 10 Conn. 62. The declaration of a legatee who it is claimed obtained the will by the employment of undue influence is not admissible in a contest to set it aside where other legatees are mentioned. Livingston's Appeal, 26 Atl. Rep. 470 (Conn., 1893); In re Baird, 47 Hun, 77.

⁴ Slaymaker v. Gundacker, 10 S. & R. (Pa.) 75.

⁵ Hathaway v. Haskell, 9 Pick. (Mass.) 42; Slater v. Lawson, B. & Ad. 396; Atkins v. Tregold, 2 B. & C. 23.

⁶ Lawrence v. Wilson (Mass., 1894), 35 N. E. Rep. 858.

⁷ Hill v. Roderick, 4 W. & S. (Pa.) 221; McCune v. McCune, 29 Mo. 117; Pool v. Morris, 29 Ga. 374.

⁸ Lambert v. Smith, 1 Cranch (U. S.), 361.

⁹ Supreme Lodge v. Schmidt, 98 Ind. 374.

¹⁰ Eakle v. Clarke, 30 Md. 322; Bryant v. Booze, 55 Ga. 438.

¹¹ Hartford Bank v. Hart, 3 Day (Conn.), 495.

¹² The admissions of a judgment debtor are not binding on the creditor or his assignee. Tisch v. Utz, 21 Atl. Rep. 808 (Pa., 1890), 28 W. N. C. 55. Cf. 1 Addison on Cont., 78-88, and 1 Pars. on Cont., 11, for test between joint and common interests.

§ 68. Admissions of partners — Their effect when made after dissolution.— If individuals are associated together with a common design in view, the law, presuming that the benefits, if any, which will inure from its accomplishment will be shared by all, will not permit any member of the combination to escape the consequences of the acts or declarations of those joined with him.¹ Thus, the declarations or acts of a partner made during the existence of the partnership, appertaining to its affairs and within its scope, and calculated to advance the interests of the firm, will bind all his associates, the law regarding each partner as the agent of all so far as the firm's affairs are concerned.² The fact of the existence of the partnership must, however, be established, at least *prima facie*, by other evidence, or the declarations, which are admitted only because contemporaneous with it, will be rejected.³ Accordingly, where the execution of a note was in issue in an action against alleged partners, the admission of its signature by one was not sufficient to enable plaintiff to recover, though the signature of the others had been proved, in the absence of other proof of an existing partnership.⁴ But by suing or defending as partners the existence of the joint interest is incidentally admitted,⁵ and also if each individual admits in turn that he is a partner with the others, such an admission,

¹ 1 Greenl. on Evid., § 111. See, also, *post*, § 69.

² Weed v. Kellogg, 6 McLean (U. S.), 44; Hunter v. Hubbard, 26 Tex. 537; Mamlock v. White, 20 Cal. 598; Park v. Wooton, 35 Ala. 242; Munson v. Wickwire, 21 Conn. 513; Holmes v. Budd, 11 Iowa, 186; Collett v. Smith, 143 Mass. 473; Rich v. Flanders, 39 N. H. 304; McKee v. Hamilton, 33 Ohio St. 7; Hutzler v. Hubbard, 26 Tex. 537; Peden v. Mail, 118 Ind. 560; Bruner v. Nesbitt, 31 Ill. App. 517; Coit v. Tracy, 8 Conn. 268; Boyd v. Thompson, 153 Pa. St. 78; Begg v. Blake, 6 Q. B. 126; Schull's Appeal, 115 Pa. St. 141; Pierce v. Roberts, 57 Conn. 40; Allen v. Clark, 66 Hun, 628.

³ Kelly v. People, 55 N. Y. 565;

People v. Stanley, 47 Cal. 113; Berry v. Lathrop, 24 Ark. 12; Alcott v. Strong, 9 Cush. (Mass.) 323; Humes v. O'Brien, 74 Ala. 64; Vanway v. Klein, 122 Ind. 416; Rich v. Flanders, 39 N. H. 304; Cowen v. Kinney, 33 Ohio St. 422; Buckman v. Barnum, 15 Conn. 68; Clark v. Hoffaker, 26 Mo. 264; Winchester v. Whitney, 138 Mass. 549; Jones v. O'Farrell, 1 Nev. 354; Henry v. Willard, 73 N. C. 35; Cowan v. Kinney, 33 Ohio St. 423; McCorkle v. Doby, 1 Strobb. (S. C.) 396; Bensley v. Brockway, 27 Ill. App. 410.

⁴ Conley v. Jennings, 22 Ill. App. 547; Gay v. Palmer, 1 Esp. 135. But see, *contra*, Fleming v. Stearns (Iowa, 1890), 44 N. W. Rep. 376.

⁵ Lucas v. De Cour, 1 M. & S. 249.

it is held, will be sufficient to establish the joint relation against all.¹

It is well settled that a partner has no implied power to bind the firm by any sealed instrument,² though a document which merely releases an existing obligation without creating a new one is not inoperative merely because under seal.³ It would seem logical, in the absence of an agreement to the contrary, that on the dissolution of the partnership an individual's declarations relating to the business of the firm would be no longer binding upon those with whom he had been but was not now associated.⁴ But where such declaration is connected with a firm transaction which took place before the dissolution, it has been received in evidence as binding on the other partners.⁵

Upon the question whether an acknowledgment or part payment of a debt after dissolution will revive a debt *barred by the statute of limitation*, the cases are not altogether harmonious. If the acknowledgment be regarded as a new contract, the original debt being extinct and the cause of action gone, the declaration cannot be admissible as evidence against the partners, though the declarant has been intrusted with the liquidation of the firm's affairs. The power to distribute the effects of the firm and to settle its affairs by discharging its valid debts does not confer a power to bind its members by a

¹ Edwards v. Tracy, 62 Pa. St. 374.

² Massey v. Pike, 20 Ark. 92; Sibley v. Young, 26 S. C. 415; McDonaldson v. Eggleston, 26 Vt. 154.

³ Morse v. Bellows, 7 N. H. 549; Pierson v. Hooker, 3 Johns. (N. Y.) 68; Fox v. Norton, 9 Mich. 207.

⁴ Hopkins v. Bank, 7 Cowen, 650; Curry v. White, 51 Cal. 530; Miller v. Neimerick, 19 Ill. 172; Craig v. Alvarson, 6 J. J. Marsh. (Ky.) 609; Rowland v. Boozer, 10 Ala. 690; Johnson v. Marsh, 2 La. Ann. 772; Flanagan v. Champion, 1 Green Ch. (N. J.) 51; Winslow v. Tulan, 48 Ill. 145; Stockton v. Johnson, 6 B. Mon. (Ky.) 409; Hogg v. Orgill, 34 Pa. St. 344; Baker v. Stockpoole, 9 Cow. (N. Y.) 420; Maxey v. Strong, 53 Mo. 280.

⁵ So a partner may, after dissolution, waive demand and notice on paper indorsed by the firm. Darling v. Marsh, 22 Me. 184; Seldner v. Bank, 66 Md. 88. See generally, Harding v. Butler, 30 N. E. Rep. 168; 156 Mass. 34; Beitz v. Fuller, 1 McCord, 541; Lefavour v. Yandes, 2 Blackf. 240; Walden v. Sherbourne, 15 Johns. 409; Loomis v. Loomis, 26 Vt. 198; Pierce v. Wood, 23 N. H. 519; Nalle v. Gates, 20 Tex. 315; Curry v. Kurtz, 33 Miss. 24; Meyers v. Standart, 11 Ohio St. 39. After dissolution a partner cannot confess judgment against the firm (Mair v. Beck, 2 Atl. Rep. 218), though he may compromise the firm's debts. Cannon v. Wildman, 28 Conn. 472.

new promise or to charge them with new debts.¹ There are some early cases which support a contrary rule upon the erroneous supposition that the acknowledgment does not create a new debt but merely continues one already existing.²

The weight of the decisions sustains the proposition that an acknowledgment or part payment after dissolution *before the debt has become barred* is not admissible to extend the time of limitation,³ though the opposite theory, that as paying debts is included in the power to wind up the firm affairs, a part payment with partnership funds is valid to bar the statute as against the other partners, is not without support.⁴

§ 69. Declarations of conspirators.—This rule by which the declarations of a partner⁵ or of a fellow-conspirator are admitted as *original* evidence binding on his associates is not based upon the fact that such declarations are admissions or confessions,⁶ but upon the fact that they are verbal acts form-

¹ Kerper v. Wood, 29 N. E. Rep. 501; 48 Ohio St. 613; Jones v. Moore, 7 Binn. 573; Story, J., in Bell v. Morrison, 1 Pet. 367. See Levy v. Cadet, 17 S. & R. 127; Searight v. Craighead, 1 Penn. 125; Yandes v. Lafavour, 2 Blackf. 371; Roosevelt v. Marks, 6 Johns. Ch. 266, 291; Van Keuren v. Parmelee, 2 Comst. (N. Y.) 523; Hackley v. Patrick, 3 Johns. 536, cited in 1 Greenl. on Evid., § 112; Bush v. Stowell, 71 Pa. St. 208; Hance v. Hair, 25 Ohio St. 349; Wallis v. Randall, 81 N. Y. 164; Rogers v. Clements, 92 N. C. 81.

² Martin v. Root, 17 Mass. 222; Ward v. Howell, 5 H. & J. 60; Wheelock v. Doolittle, 3 Wash. 440; Cady v. Shepherd, 11 Pick. 400; Bridge v. Gray, 14 id. 61; Fisher v. Tucker, 1 McCord, 175; McIntire v. Oliver, 2 Hawks, 209; Bissell v. Adams, 55 Conn. 399; Buxton v. Edwards, 134 Mass. 567; Patterson v. Choate, 7 Wend. 441; Shepley v. Waterhouse, 22 Me. 497; Merritt v. Day, 38 N. J. L. 32; Hopkins v. Banks, 7 Cow. 650; Goddard v. Ingram, 3 Q. B. 839;

Whitcomb v. Whiting, 2 Doug. 652 (Eng., 1781); Jackson v. Fairbanks, 2 H. Bl. 340, cited in 1 Greenl. on Evid., § 112. Sometimes a distinction has been made and it has been held that the admission is only admissible to show non-payment, and that the original debt must be established otherwise. Patterson v. Choate, 7 Wend. 441; Orange v. Low, 5 Gill & J. 134, and cases *supra*.

³ Espey v. Comer, 76 Ala. 501; Bissell v. Adams, 35 Conn. 299; Merritt v. Pollys, 16 B. Mon. (Ky.) 355; Newman v. McComas, 43 Md. 70; Graham v. Selover, 59 Barb. (N. Y.) 313; Reppert v. Colvin, 48 Pa. St. 248.

⁴ Greenleaf v. Quincy, 12 Me. 11; Beardsley v. Hall, 36 Conn. 270; McClurg v. Howard, 45 Mo. 365; Casebolt v. Ackerman, 46 N. J. L. 169; Wood v. Barber, 90 N. C. 76; Mix v. Shattuck, 50 Vt. 421; Tappan v. Kimball, 30 N. H. 136; Buxton v. Edwards, 134 Mass. 367.

⁵ See § 68.

⁶ See *post*, § 97.

ing a part of the principal transaction or *res gestæ*. That they should be against the interests of the declarant or his associates is not always necessary if they possess the contemporaneous character and explanatory effect required.¹ Thus, in the case of a conspiracy, it is requisite that its existence should be presumptively established by evidence sufficient to go to the jury;² the language of one who is shown to have been engaged in it is original evidence against his fellow-conspirators. It matters not at what stage of the undertaking any one may have joined, the fact of his association with it being equivalent to ratification of what has preceded it or whatever may subsequently be done or said.³ But it is a fundamental rule that the declarations or acts, including written as well as oral utterances, should have occurred during the existence of the criminal association, and that they were designed to aid in its accomplishment. If subsequent, they are narrative simply and constitute no part of the transaction.⁴

¹ As to confessions, see §§ 96-98.

² *Rutherford v. Schattman*, 119 N. Y. 604; 23 N. E. Rep. 440; *Foster v. Thrasher*, 45 Ga. 517; *Reid v. Louisiana, etc. Co.*, 29 La. Ann. 388; *Hamilton v. People*, 29 Mich. 195; *Holliday v. Jackson*, 30 Mo. App. 263; *Wiggins v. Thrasher*, 9 Iowa, 194; *Com. v. Crowninshield*, 10 Pick. 497; *Ormsby v. People*, 53 N. Y. 472; *Kelsey v. Murphy*, 26 Pa. St. 78; *United States v. McKee*, 3 Dill. (U. S.) 546; *Moore v. Shields*, 121 Ind. 267; *Carskadon v. Williams*, 7 W. Va. 784; *Triplett v. Goff*, 83 Va. 784; *McGraw v. Com. (Ky., 1893)*, 20 S. W. Rep. 279; *Amos v. State (Ala., 1893)*, 11 S. Rep. 424. The declaration may be admitted prior to the proof of the conspiracy. *Hall v. State (Fla., 1893)*, 12 S. Rep. 449; *State v. Grant (Iowa, 1893)*, 53 N. W. Rep. 120.

³ *McRae v. State*, 71 Ga. 96; *Amer. F. Co. v. United States*, 2 Pet. 358, 365; *People v. Kerr*, 6 N. Y. S. 674; *Rex v. Hardy*, 24 How. St. Tr. 451 et seq.; *State v. McCahill*, 72 Iowa,

111; *Kehoe v. Com.*, 85 Pa. St. 127; *Tow v. State*, 22 Tex. App. 175; *United States v. McKee*, 3 Dill. C. C. 546; *Smith v. State (Tex., 1893)*, 20 S. W. Rep. 876; *People v. Collins*, 64 Cal. 293; *Ryan v. State*, 83 Wis. 486; *Deakers v. Temple*, 41 Pa. St. 234; *Smith v. State*, 53 Ala. 407; *Colt v. Eves*, 12 Conn. 243; *Kelley v. People*, 55 N. Y. 565; *Philpot v. Taylor*, 75 Ill. 309; *State v. Ross*, 29 Mo. 32; *Mask v. State*, 32 Miss. 405; *Bryce v. Buttler*, 70 N. C. 585; *Lees v. Lamprey*, 43 N. H. 13; *Dart v. Walker*, 3 Daly (N. Y.), 138.

⁴ *Spies v. People*, 122 Ill. 1; *State v. Melrose*, 98 Mo. 594; *Kunde v. State*, 22 Tex. App. 65; *State v. Grant (Iowa, 1893)*, 53 N. W. Rep. 120; *State v. Larkin*, 49 N. H. 39; *State v. Minton (Mo., 1893)*, 22 S. W. Rep. 808; *Card v. State*, 109 Ind. 418; *Searles v. State*, 6 Ohio Cir. Ct. Rep. 331; *People v. Irwin*, 77 Cal. 494; *People v. McQuade*, 110 N. Y. 284; *People v. Kief*, 12 N. Y. S. 896; 58 Hun, 337.

So where a conspiracy was shown to exist, a book purporting to be a treatise upon modern methods of employing explosives to secure a radical revolution in the social system was admitted to illustrate the purpose of the conspirators where several of them were tried for murder. The book was distributed among the members of an association to which the conspirators belonged, was commended by their newspapers, and was constantly consulted and circulated by them.¹

§ 70. Assignor and assignee.—An assignee of a chose in action or chattel, with the exception of a *bona fide* holder of a negotiable instrument not yet due, is bound by the admissions of his assignor, made prior to the assignment, disparaging or qualifying the title by which the assignor holds.² But declarations in disparagement of title to property, real or personal, in order to be valid as admissions against the grantee or assignee, must be made while the grantor or the assignor is in possession.³ Thus, the admissions, made after the assignment, of one who has made an assignment for the benefit of creditors are not admissible against the assignee to set aside the assignment,⁴ unless it is shown that a conspiracy has been

¹ *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829. See, also, *McRae v. State*, 71 Ga. 96; *Kehoe v. Com.*, 85 Pa. St. 127; *People v. Geiger*, 49 Cal. 643; *State v. McCahill*, 72 Iowa, 121.

² *Alger v. Andrews*, 47 Vt. 238; *Crow v. Watkins*, 48 Ark. 169; *Lears v. Rice*, 65 Mich. 97; *Howell v. Howell*, 47 Ga. 492; *Roberts v. Medbury*, 132 Mass. 100; *Alexander v. Caldwell*, 55 Ala. 517; *Dodge v. Freedman, etc. Co.*, 93 U. S. 579; *Roebke v. Andrews*, 26 Wis. 311; *Downs v. Beldon*, 46 Vt. 674; *Harrington v. Chambers*, 3 Utah, 94; *McFadden v. Ellmaker*, 52 Cal. 348; *McSweeney v. McMillan*, 96 Ind. 298; *Ramsbottom v. Phelps*, 18 Conn. 278; *Mueller v. Rebhan*, 94 Ill. 142; *Robinson v. Robinson*, 22 Iowa, 247; *Fellows v. Smith*, 130 Mass. 378; *Tyres v. Kennedy*, 126 Ind. 523; *Adams v. Davidson*, 10 N. Y. 309; *Chadwick v.*

Fowner, 69 N. Y. 404; *Platner v. Platner*, 78 N. Y. 90; *Gidney v. Logan*, 79 N. C. 214; *Hunt v. Haven*, 56 N. H. 87; *Ten Eyck v. Runk*, 26 N. J. L. 513; *Williard v. Williard*, 56 Pa. St. 119.

³ *Mobile Bank v. McDonnell*, 89 Ala. 434; *Shipley v. Fox*, 69 Md. 572; *Crow v. Watkins*, 48 Ark. 169; *Davis v. Evans*, 102 Mo. 164; *Flagler v. Wheeler*, 40 Hun, 125, 178; *Waldon v. Purvis*, 73 Cal. 518; *Harrell v. Culpepper*, 47 Ga. 635; *Marion v. Hoyt*, 72 id. 117; *Proctor v. Cole*, 164 Ind. 373; *Benson v. Lundy*, 52 Iowa, 256; *Randegger v. Ehrhardt*, 51 Ill. 101; *Deasy v. Thurman*, 1 Idaho, 775; *Roberts v. Medbury*, 132 Mass. 100; *Gordon v. Ritenour*, 87 Mo. 54.

⁴ *Wynne v. Glydwell*, 17 Ind. 446; *Burt v. McKinstry*, 4 Minn. 146; *Frear v. Evertsen*, 20 Johns. (N. Y.) 142; *Myers v. Kinzie*, 26 Ill. 36; *Bartlett v. Marshall*, 2 Bibb (Ky.),

formed between them to defraud the creditors, when the declarations of the assignor are admissible as a part of the *res gestæ*.¹ The rule by which such admissions are receivable against the assignee is not applicable to bind the holder of a promissory note which is taken without notice and before maturity.² If the promissory note is transferred after it is due, the declarations of the indorser, made while the note was in his possession, are admissible against the indorsee to prove payment or any equitable defense which may have existed between him and the maker.³

§ 71. Wife's admission — When binding on husband.— The declarations of a wife are not to be regarded as the admissions of the husband unless authority to make them has been conferred upon her by him.⁴ If they are binding it is

467; *Heywood v. Reed*, 4 Gray (Mass.), 574; *Carlton v. Baldwin*, 27 Tex. 572; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Bates v. Ableman*, 13 Wis. 644.

¹*Tibbals v. Jacobs*, 31 Conn. 428; *Ewing v. Gay*, 12 Ind. 64; *Souder v. Schechterly*, 91 Pa. St. 83; *Hutchings v. Castle*, 48 Cal. 152; *Hodge v. Thompson*, 9 Ala. 131; *Boyd v. Jones*, 60 Mo. 454; *De France v. Howard*, 4 Iowa, 524; *Cuyler v. McCartney*, 33 Barb. (N. Y.) 165; *Perkins v. Towle*, 59 N. H. 583.

²*Blanc Jour v. Tutt*, 32 Mo. 576; *Hackett v. Martin*, 8 Grèenl. (Me.) 77; *Paige v. Cagwin*, 7 Hill (N. Y.), 361; *Bristol v. Daun*, 12 Wend. (N. Y.) 142; *Wilson v. Bowden*, 113 Mass. 422; *Osborn v. Robbins*, 37 Barb. (N. Y.) 481; *Washburn v. Ramsdell*, 17 Vt. 299.

³*Sandifer v. Howard*, 59 Ill. 246; *Glanton v. Griggs*, 5 Ga. 424; *Drennon v. Smith*, 3 Head (Tenn.), 389; *Miller v. Bingham*, 29 Vt. 82; *Pilcher v. Kerr*, 7 La. Ann. 244; *Sylvester v. Crapo*, 15 Pick. (Mass.) 92; *Kane v. Tarbit*, 23 Ill. App. 311; *Robb v. Schmidt*, 35 Mo. 290; *McLanathan v. Patten*, 39 Md. 142; *Fisher v. True*,

38 id. 534; *Hutchins v. Hutchins*, 98 N. Y. 56; *Sanford v. Ellithorpe*, 95 N. Y. 48; *Headen v. Womack*, 88 N. C. 468; *Hirschfeld v. Williamson*, 18 Nev. 66; *McLaughlin v. McLaughlin*, 91 Pa. St. 462; *Downs v. Belden*, 46 Vt. 674; *Tierney v. Corbett*, 2 Mackey, 264.

⁴*Edwards v. Tyler* (Ill., 1892), 31 N. E. Rep. 312; *Rochelle v. Harrison*, 8 Port. (Ala.) 351; *Perry v. Graham*, 18 Ala. 822; *White v. Portland* (Conn., 1893), 26 Atl. Rep. 342; *Snohll v. Met. R. Co.*, 19 D. C. 399; *Hunt v. Strew*, 33 Mich. 85; *Johnson v. Sherwin*, 3 Gray (Mass.), 374; *Evans v. Evans*, 155 Pa. St. 572; *May v. Little*, 3 Ired. L. (N. C.) 27; *Gaffield v. Scott*, 40 Ill. App. 380; *Lay Grae v. Peterson*, 2 Sandf. (N. Y.) 338; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *Park v. Hopkins*, 2 Bailey (S. C.), 408; *Berg v. Warner*, 47 Minn. 250; *Winkler v. Schlager*, 19 N. Y. S. 100; *Higham v. Vanosdol*, 101 Ind. 160; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Baker v. Witten* (Ok., 1892), 39 Pac. Rep. 491; *Norfolk Nat. Bank v. Wood*, 33 Neb. 113; 49 N. W. Rep. 958; *Rose v. Chapman*, 44 Mich. 312; *Coryell v. State*, 62 Ind.

not because of the legal character of the marriage relation, but solely because the husband has constituted her his agent,¹ and given her authority to act for him.

The considerations regulating this subject are analogous to those which determine the existence of the relation of principal and agent, modified somewhat by the peculiar position of the parties and the intimacy which usually exists between them. At common law, in consequence of the merger of legal identity of the wife in that of the husband, her admissions did not bind him where he sued as her representative during coverture to reduce her choses in action to possession.² In consequence, however, of the modern statutes by which a married woman is enabled to carry on business and to act in general with the powers of a *feme sole*, this rule is of minor importance and of infrequent application. In any event, if the existence of the relationship of principal and agent is shown to exist by evidence *aliunde*,³ the statements of the wife relating to the business of the agency, made during its continuance and within the scope of her authority, are receivable against the husband.⁴

307; *Goodrich v. Tracy*, 43 Vt. 314; *Donaldson v. Everhart*, 50 Kan. 718. The declarations of the husband are not, where no agency exists, admissible in an action against the separate estate of the wife. *Clapp v. Engledow*, 82 Tex. 290; *Martin v. Rutt*, 127 Pa. St. 380; *McIntire v. Costello*, 6 N. Y. S. 397; *Woodruff v. White*, 25 Neb. 745; *Hunt v. Poole*, 139 Mass. 224; *Bunson v. Brooks*, 68 Ala. 248; *State v. Bank*, 10 Mo. App. 482; *Keller v. Railway Co.*, 27 Minn. 178; *Kingen v. State*, 50 Ind. 537. But where husband and wife claim by adverse possession, his admissions are binding on her solely by reason of the joint interest. *Hurley v. Lockett*, 72 Tex. 262. *Cf. Holton v. Carter* (Ga., 1893), 15 S. E. Rep. 819.

¹ See § 73a.

² *Turner v. State*, 50 Miss. 351, 354; *Meredith v. Footner*, 11 M. & W. 202;

Burnett v. Burkhead, 21 Ark. 77; *Jordan v. Hubbard*, 26 Ala. 433; *Coe v. Turner*, 57 Conn. 937.

³ *Butler v. Price*, 115 Mass. 578; *Hunt v. Strew*, 33 Mich. 85; *Deck v. Johnson*, 1 Abb. App. Dec. (N. Y.) 497. The mere existence of the relation of husband and wife will never, it is held, render the admission of one binding on the other. *Deck v. Johnson, supra*; *Schmidt v. Keen*, 10 N. Y. S. 267.

⁴ *Chamberlain v. Davis*, 33 N. H. 121; *McLean v. Jagger*, 13 How. Pr. (N. Y.) 494; *Murphy v. Hubert*, 16 Pa. St. 50; *Colgan v. Phillips*, 7 Rich. (S. C.) 359; *Robertson v. Brost*, 83 Ill. 116; *Arndt v. Harshaw*, 53 Wis. 269; *Bradford v. Williams*, 2 Md. Ch. 1, 3; *Lunay v. Vantyne*, 40 Vt. 501; *Town v. Lamphire*, 37 id. 52; *Thomas v. Hargrove*, *Wright* (Ohio), 595.

§ 72. **Admissions of inhabitants of towns.**— At common law the admission of a parishioner or inhabitant of an incorporated political division was receivable against the corporation.¹ In this country this rule is repudiated. By analogy to private corporations, the declarations of the residents of municipal or *quasi*-municipal corporations as towns and counties are not receivable against the corporation, even under circumstances where the action is in form against the inhabitants, and their individual property is, as in New England, subject to execution on the judgment which may be rendered.²

§ 73. **Admissions of strangers to the record — Principal and surety — Admissions of real parties.**— The admissions of the real parties in interest, though they may not be parties to the record, are usually receivable. Thus it has been held that the admissions of a debtor are receivable against the surety,³ of the guarantor against his principal,⁴ of the actual beneficiary in an insurance taken in the name of another,⁵ of a deputy-sheriff against the sheriff,⁶ of the deceased intestate against the administrator.⁷ So where an individual has a real interest in the litigation, although he may not be an actual party of record, yet, so long as the actual defendant may in turn recover over against him, he is bound by the judgment, which would then be evidence against him, and his admissions are receivable against himself and against the nominal defendant.⁸ But this admission by the real party in interest to be binding on the party to the suit must be made while he had an interest, that is, during the existence of joint interest or privity, and it must relate to the transaction in which both

¹ *Rex v. Hardwick*, 11 East, 579;
Reg. v. Adderbury, 5 Q. B. 187.

² *Landaff's Petition*, 34 N. H. 164;
Watertown v. Cowen, 4 Paige, 510;
Burlington v. Calais, 1 Vt. 385; *Low v. Perkins*, 10 Vt. 532; *Davis v. Rochester*, 66 Hun, 629. See *Tiedeman on Municipal Corporations*, § 103, 180.

³ *Walker v. Forbes*, 25 Ala. 139.

⁴ *Chapel v. Washburn*, 11 Ind. 393;
Brown v. Munger, 16 Vt. 12.

⁵ *Bell v. Ansly*, 16 East, 141.

⁶ *Snowball v. Goodricke*, 4 B. & Ad.

⁷ *Keifer v. Carnsi*, 7 D. C. 156.

⁸ *Bank v. Smith* 12 Allen, 243;
Weed v. Kellogg, 6 McLean, 44;
Bond v. Ward, 1 Nott & McCord, 201; *McShane v. Bank*, 73 Md. 135;
Savage v. Balch, 8 Greenl. 27; *Union Bank v. Edwards*, 1 Swan (Tenn.); 208; *Atlas Bank v. Brownell*, 9 R. I. 168; *Bartlett v. Delprat*, 4 Mass. 702, 708; *MacCready v. Schenck*, 41 La. Ann. 456; *Bayly v. Bryant*, 24 Pick. (Mass.) 198; *Clark v. Carrington*, 7 Cranch, 308, 322; *Markland v. Kim-mell*, 87 Ind. 566.

are concerned.¹ Thus, where it is sought to introduce the admission of the principal in a suit against a surety, it should be remembered that the latter is only obligated for the principal's acts and not for his language. If, therefore, the admission does not constitute a part of the *res gestæ*, or, in other words, if it is not a verbal act, then the surety is not bound thereby.² So where payment is guarantied for goods sold and delivered, an acknowledgment by the purchaser of the goods, made subsequent to the delivery, that he has received the goods, is not admissible in an action against the surety for the price.³

The admissions of a fiduciary official, made after an embezzlement or other breach of trust, are not competent or receivable as admissions against his surety where an action is brought on the bond to recover for the official misfeasance.⁴ The admissions of a nominal party, as of a trustee or guardian, made subsequent to the bringing of the suit, are not binding on the party he represents.⁵ So, too, the statements of a trustee, administrator⁶ or guardian, made before he was appointed or before the suit in which he sues in his representative capacity was commenced, are not receivable as admissions against him.⁷

¹ Chapel v. Washburn, 11 Ind. 393; Brown v. Munger, 16 Vt. 12. It has been held that the admission of a surety is competent against the principal. Chapel v. Washburn, 11 Ind. 393; Brown v. Munger, 16 Vt. 12; Brockway v. Petted (Mich., 1890), 45 N. W. Rep. 61; Hall v. Brackett, 62 N. H. 509.

² Lee v. Brown, 21 Kan. 458; Dexter v. Clemans, 17 Pick. 175; Labaree v. Klesterman (Neb., 1892), 49 N. W. Rep. 1102; 33 Neb. 150; Bank of Monroe v. Gifford, 70 Iowa, 580; Keegan v. Carpenter, 47 Ind. 597; Cheltenham Co. v. Cook, 44 Mo. 29; Chemsford Co. v. Demarest, 7 Gray (Mass.), 1; Hatch v. Elkins, 64 N. Y. 489; White v. German Bank, 9 Heisk. (Tenn.) 473; Ayer v. Getty, 46 Hun, 287; Bank v. Darragh, 1 Hun, 113; Bardwell v. Dewitt, 44 N. W. Rep.

983; 42 Minn. 468; Otis v. Van Storch, 15 R. I. 41.

³ Longenecker v. Hyde, 6 Binn. 1.

⁴ Dawes v. Shedd, 15 Mass. 69; Stetson v. City Bank, 2 Ohio St. 167, 177; Blair v. Insurance Co., 10 Mo. 559; Republica v. Davis, 3 Yeates, 128; Hotchkiss v. Lyon, 2 Blackf. 222; Miller v. Stewart, 9 Wheat. 703.

⁵ Sykes v. Lewis, 17 Ala. 261; Sargeant v. Sargeant, 18 Vt. 371; Dazey v. Mills, 10 Ill. 67; Hough v. Barton, 20 Vt. 455; Mayes v. Inman, 2 Swan (Tenn.), 80.

⁶ Prud. Ins. Co. v. Fredericks, 41 Ill. App. 419.

⁷ Mertz v. Detweiler, 8 W. & S. (Pa.) 376; Plant v. McEwen, 4 Conn. 544; Moore v. Butler, 48 N. H. 161; Fraser v. Marsh, 2 Stark. 41; Legge v. Edmonds, 25 L. J. Ch. 125.

§ 73a. **The declarations of agents.**—The legal unity of principal and agent in respect to matters growing out of the agency or to which it relates is the basis for the rule that the declarations or admissions of an agent, made during the existence of the agency and relating to its object, are binding on the principal.¹ Thus, an agent to sell may by his admissions bind his principal upon the question of the value of the property;² and where a principal directs some third person to pay money or ship goods to his agent, the acknowledgment or receipt of the agent is an admission of the principal.³ If made during the period of the continuance of the agency and by reason of some special or express authorization by the principal to make the given admission or declaration, then the words of the agent are admissible against his principal upon the same grounds that the latter's own admission would be evidence against him. But where no express authority is given to make the declaration, and where the agent is a special agent, and the only ground for claiming its admission as original evidence is an implied authority to make it, derived from the existence of the agency, then the declaration is admitted solely as a part of the *res gestæ*, and accordingly must be contemporaneous with and explanatory of it.

Unauthorized admissions made subsequent to the transaction to which they relate, and merely narrative of it, are not binding upon the principal, though the relation of principal and agent exists for other purposes.⁴ Thus, the declarations

¹ *Hawk v. Applegate*, 37 Mo. App. 32; *Davis v. Rochester*, 66 Hun, 629; *W. U. Tel. Co. v. Bennett*, 1 Tex. Civ. App. 28; *McElwee v. Trowbridge*, 68 Hun, 28; *Loomis v. N. Y. Cent. R. Co.* (Mass., 1893), 34 N. E. Rep. 30; *Mars v. Virginia Home Ins. Co.*, 17 S. C. 514; *Joseph v. Mady Clo. Co.* (Mont., 1893), 33 Pac. Rep. 1; *Citizens' Gaslight Co. v. Granger*, 19 Ill. App. 201; *Rowell v. Klein*, 44 Ind. 290; *Donnel v. Clark*, 12 Kan. 154; *Hamilton v. Iowa Co.* (Iowa, 1893), 53 N. W. Rep. 496; *Coyle v. Baltimore, etc. R. Co.*, 11 W. Va. 94; *Bohannon v. Chapman*, 13 Ala. 641; *Galceran v. Noble*, 66 Ga. 367; *Adams v. Humphreys*, 54 Ga. 396; *Pavey v. Wintrobe*, 87 Ind. 379; *Mix v. Osby*, 62 Ill. 193; *Hitchings v. St. Louis Transp. Co.*, 68 Hun, 33; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496; *Peck v. Kitchie*, 66 Mo. 114; *Hammett v. Emerson*, 27 Me. 308.

² *Bank v. Gidrot*, 19 Ga. 421.

³ *Click v. Hamilton*, 7 Rich. (S. C.) 65; *Webster v. Clark*, 30 N. H. 245.

⁴ *Phelps v. James* (Iowa, 1893), 53 N. W. Rep. 74; *Yordy v. Marshall Co.* (Iowa, 1893), 53 N. W. Rep. 298; *St. Louis, etc. Co. v. Sweet* (Ark., 1893), 21 S. W. Rep. 787; *Mobile, etc.*

of an engineer or conductor of a train, made after an accident and constituting no part of the transaction, are not receivable, as he has no implied authority to make statements which will be binding on his principal.¹ So a corporation is not bound by the admissions of its officers, trustees, directors or stockholders unless either they have been specially authorized to make the admission or it has been made as a part of some authorized transaction;² for it is a general rule that admis-

Co. v. Klein, 43 Ill. App. 63; Louisville, etc. Co. v. Foley (Ky., 1893), 21 S. W. Rep. 866; Bradford v. Williams, 2 Md. Ch. 1; Phelps v. George's Creek, etc. R. Co., 60 Md. 536; Garfield v. Knight's Ferry, etc. Co., 14 Cal. 35; Tillinghast v. Nourse, 14 Ga. 641; Chicago, etc. Road v. Fietsam, 19 Ill. App. 55; Board of Com'rs of Franklin County v. Bunting, 111 Ind. 143; Dietrich v. Baltimore, etc. R. Co., 58 Md. 347; Aldridge v. Midland, etc. Co., 78 Mo. 559; Craig v. Gilbreth, 47 Me. 416; Dorne v. Southwork Manuf'g Co., 11 Cush. (Mass.) 205; Batchelder v. Emery, 20 N. H. 165; Murphy v. May, 9 Bush (Ky.), 33; Clark v. Anderson, 14 Daly, 464; Winter v. Burt, 31 Ala. 33; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Union Pac. R. Co. v. Fray, 12 Pac. Rep. 98; 35 Kan. 700; Osgood v. Bringolf, 32 Iowa, 265; Hawk v. Applegate, 37 Mo. App. 32; Gooch v. Bryant, 13 Me. 386; Lowry v. Harris, 12 Minn. 166; Jones v. Jones, 120 N. Y. 589; McDermot v. Hannibal, etc. R. Co., 73 Mo. 516; Burnham v. Ellis, 39 Me. 319; Memphis, etc. R. Co. v. Cock, 64 Miss. 713; Converse v. Blumrich, 14 Mich. 109; Woods v. Banks, 14 N. H. 101; Demeritt v. Meserve, 39 N. H. 521; Runk v. Ten Eyck, 24 N. J. L. 750; American Steamship Co. v. Landreth, 102 Pa. St. 131; Raiford v. French, 11 Rich. (S. C.) 367; Austin v. Chittenden, 33 Vt. 53; Goetz v. Kansas City Bank, 119 U. S. 318, 551; Packet Co. v.

Clough, 20 Wall. (U. S.) 528; Fogg v. Child, 13 Barb. (N. Y.) 246; Patten v. Messenger, 25 Pa. St. 393; Cobb v. Johnson, 2 Sneed (Tenn.), 73; Barnard v. Henry, 25 Vt. 289.

¹ Fort Smith Oil Co. v. Slover (Ark., 1894), 24 S. W. Rep. 106; Wendt v. Chicago, etc. Co. (S. D., 1894), 54 N. W. Rep. 226; East Tennessee, etc. R. Co. v. Maloy, 2 S. E. Rep. (Ga.) 941; Furst v. Second Ave. R. Co., 72 N. Y. 542; Michigan Cent. R. Co. v. Carlow, 73 Ill. 348; Ballard v. Manuf'g Co., 15 N. Y. S. 405. The printed rules of a railroad company are admissible as its admissions. Railroad v. Ward, 35 Ill. App. 423.

² Bullock v. Consumers' Lumber Co. (Cal., 1893), 31 Pac. Rep. 367; Railway Co. v. Levy (Ind. Sup., 1893), 32 N. E. Rep. 815; Ohio & M. Ry. Co. v. Levy (Ind., 1893), 34 N. E. Rep. 245; Johnson v. East Tenn., Va. & P. Ry. Co. (Ga., 1893), 17 S. E. Rep. 21; La Rue v. St. Anthony & D. Elevator Co. (S. D., 1893), 54 N. W. Rep. 806; Pittsburg & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252; Van Doren v. Bailey, 48 Minn. 305; Missouri Pacific Ry. Co. v. Sherwood, 84 Tex. 125; Bellow v. Fuller, id. 450; Rodes v. Elevator Co., 49 Minn. 370; Weeks v. Inhabitants, 156 Mass. 289; Thomas v. Rutledge, 67 Ill. 213; Jacksonville, etc. Co. v. Pen. Trans. Co. (Fla., 1890), 9 S. Rep. 661; Peek v. Detroit Novelty Works, 29 Mich. 313; Lime Rock Bank v. Hewitt, 52 Me. 531; Walker v. Dunspaugh, 20 N. Y. 170; Abbott

sions or declarations of an agent which are narrative in character must, in order to bind the principal, be within the scope of his power, whether general or special, or must relate to the subject of his agency and be a part of it.¹ Accordingly the principal is never bound by the admission or declaration of a person made by the latter before he has become an agent or after the agency has terminated.²

As regards written admissions under seal, no particular form of words is necessary to bind the principal, provided the instrument is sealed with the principal's seal and signed with his name by the agent for him. If the instrument does not show that it is intended to be the admission of the principal, it will not generally bind him, though the agent in signing may have affixed his title or indicated that he signs

v. Seventy-six L. & W. Co., 87 Cal. 323; Pemigewasset Bank v. Rogers, 18 N. H. 255; Green v. North Buffalo, 56 Pa. St. 110; Salado College v. Davis, 47 Tex. 131; Wellington v. Boston R. R. Co. (Mass., 1893), 33 N. E. Rep. 393; Schroepel v. Syracuse Plankroad, 7 How. Pr. (N. Y.) 94; Low v. Connecticut, etc. R. Co., 45 N. H. 370; Cleveland, C., C. & I. Ry. Co. v. Closser, 126 Ind. 348. See Res Gestæ, §§ 54-57.

¹ Beasley v. Fruit Packing Co., 92 Cal. 388; Ohio & M. Ry. Co. v. Stein (Ind., 1892), 31 N. E. Rep. 180; Strawbridge v. Spann, 8 Ala. 820; Phelps v. James (Iowa, 1893), 53 N. W. Rep. 274; Perkins v. Burnett, 2 Root (Conn.), 30; Mobile, etc. Co. v. Klein, 43 Ill. App. 63; Galceran v. Noble, 66 Ga. 367; Maltby v. Kirkland, 48 Fed. Rep. 760; Mix v. Osby, 62 Ill. 193; Covington, etc. Road v. Ingles, 15 B. Mon. (Ky.) 637; Idaho Ford Co. v. Firemen's Ins. Co. (Utah, 1893), 29 Pac. Rep. 826; Yordy v. Marshall Co. (Iowa, 1893), 53 N. W. Rep. 298; Gutchess v. Gutchess, 66 Barb. (N. Y.) 483; Telephone Co. v. Thompson, 112 Pa. St. 118; Vassar v. Knickerbocker

Ice Co., 17 N. Y. S. 182; Holt v. Spokane R. Co. (Idaho, 1894), 35 Pac. Rep. 39. Where the authority of the agent is disputed by the principal, the declarations and acts of the alleged agent are not received in favor of a third party to prove the existence of the agency. Mussey v. Beecher, 3 Cush. (Mass.) 517; Trustees, etc. v. Bledsoe, 5 Ind. 133; Brigham v. Peters, 1 Gray (Mass.), 145; Dowden v. Cryler (N. J., 1893), 26 Atl. Rep. 941.

² Bensley v. Brockway, 27 Ill. App. 410; Levy v. Mitchell, 6 Ark. 138; Wiggins v. Leonard, 9 Iowa, 194; Haven v. Brown, 7 Me. 421; Stiles v. Western R. Co., 8 Met. (Mass.) 44; Williams v. Williamson, 6 Ired. L. (N. C.) 281; Raiford v. French, 11 Rich. (S. C.), 367; Colquitt v. Thomas, 8 Ga. 268; Watermann v. Peet, 11 Ill. 648; Renolds v. Rowley, 2 La. Ann. 890; Polleys v. Ocean Ins. Co., 14 Me. 141; Caldwell v. Garner, 31 Mo. 131; Vail v. Judson, 4 E. D. Smith (N. Y.), 165; Brigham v. Carr, 21 Tex. 142; Rahm v. Deig, 121 Ind. 283; Davis v. Whitesides, 1 Dana (Ky.), 177.

in a representative capacity,¹ as by inserting in some part of the instrument the name of the principal.²

Declarations of an agent are inadmissible to prove the existence of the agency³ or to show that the extent of the authority actually conferred was larger or smaller than is alleged.⁴

• § 74. **Admissions by attorneys of record.**—The declarations of an attorney are only binding as admissions upon his client when they are formal and deliberate, as where written stipulations are entered into to facilitate the prosecution of the suit by dispensing with some technical rule of procedure⁵ or agreeing upon certain proof which it is proposed to produce.⁶ But verbal statements by the attorney in casual con-

¹ *Briggs v. Partridge*, 64 N. Y. 357; *Meech v. Smith*, 7 Wend. 315; *Whitford v. Laidler*, 94 N. Y. 155; *Dayton v. Warne*, 43 N. J. L. 659; *Mahoney v. McLean*, 26 Minn. 415; *Taylor v. Association*, 68 Ala. 229; *Hancock v. Yunker*, 83 Ill. 208.

² *Faw v. Meals*, 65 Ga. 711; *Robinson v. Kanawha, etc. Co.*, 8 N. E. Rep. 683; *Sturdivant v. Hull*, 59 Me. 172; *Tilden v. Barnard*, 43 Mich. 376.

³ *Hardy v. Cheny*, 42 Vt. 417; *Rhodes v. Lowry*, 54 Ala. 4; *Duryea v. Vosburgh* (N. Y., 1890), 24 N. E. Rep. 308; *French v. Wade*, 35 Kan. 391; *Haughton v. Maurer*, 55 Mich. 323; *Lafayette, etc. Co. v. Elman*, 30 Ind. 83; *Seymour v. Matteson*, 42 How. Pr. (N. Y.) 496; *Osgood v. Pacey*, 23 Ill. App. 116; *Bowker v. Delong*, 141 Mass. 351.

⁴ *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Chicago R. Co. v. Fox*, 41 id. 106; *Galbreath v. Cole*, 61 Ala. 139; *Stollenmaeck v. Thatcher*, 115 Mass. 224; *Lolmer v. Insurance Co.*, 121 id. 439; *Mapp v. Phillips*, 32 Ga. 72; *Carter v. Burnham*, 31 Ark. 212; *Dawson v. Landreaux*, 29 La. Ann. 363; *Grover, etc. Co. v. Polhemus*, 34 Mich. 247; *Stringham v. Insurance Co.*, 4 Abb. App. Dec. (N. Y.) 315.

⁵ *Hanson v. Hoit*, 14 N. H. 56.

⁶ *Voisin v. Insurance Co.*, 67 Hun, 365; *McRea v. Insurance Bank*, 16 Ala. 755; *Mather v. Phelps*, 2 Root (Conn.), 150; *Perry v. Simpson Mfg. Co.*, 40 Conn. 313; *Worley v. Hinman* (Ind., 1893), 33 N. E. Rep. 866; *Proctor v. Old Colony R. Co.*, 154 Mass. 251; 28 N. E. Rep. 13; *Martin v. Capital Ins. Co.*, 52 N. W. Rep. 534; *Reynders v. Hindman*, 88 Ga. 314. *Cf. Milbank v. Jones*, 17 N. Y. S. 464. An attorney cannot compromise a suit without express authority (*Maye v. Cogdell*, 69 N. C. 93; *Repp v. Wiles* (Ind., 1892), 29 N. E. Rep. 441; *Holker v. Parker*, 7 Cranch, 436; *Peters v. Lawson*, 66 Tex. 336; *Barrett v. Railroad Co.*, 45 N. Y. 628, 638; *Granger v. Batchelder*, 54 Vt. 348; *Crotty v. Egle*, 35 W. Va. 143; *Whitehall v. Kellar*, 100 Pa. St. 89; *Martin v. Insurance Co.* (Iowa, 1893), 52 N. W. Rep. 534); though he may submit a demand to arbitration. *Brooks v. New Durham*, 55 N. H. 559; *McElrath v. Middleton* (Ga., 1893), 14 S. E. Rep. 906; *Talbot v. McGee*, 4 B. Mon. (Ky.) 377; *White v. Davidson*, 8 Md. 169; *Williams v. Tracy*, 95 Pa. St. 308.

versation¹ cannot be regarded as the admissions of the client, though pertaining to the subject of litigation, for the attorney is the agent of the client only so far as the management of the cause which has been committed to him in court is concerned,² and upon general principles cannot bind his principal outside of the scope of his authority.³

Written admissions by an attorney, made either before beginning suit or after its termination and referring to it, are never admissible against the client unless they were expressly authorized by him.⁴

A client is estopped by the admissions of his attorney, in the absence of gross mistake or fraud, where, relying on such admissions, reciprocal admissions have been made by his opponent.⁵ If the authority of the attorney to make the admissions exists generally, his admissions, when not acted on by the other side, are *prima facie* evidence only, their sole effect being merely to relieve the adverse party from showing the facts involved in them.⁶

¹ Angle v. Bilby, 25 Neb. 595.

² See as to admissions of agents, § 73a.

³ Bank v. Anderson, 28 S. C. 148; Perry v. Simpson Co., 40 Conn. 313; Lord v. Bigelow, 124 Mass. 185; Lewis v. Duane, 68 Hun, 28; Underwood v. Hart, 23 Vt. 120; Young v. Wright, 1 Campb. 139; Wright v. Dickinson (Mich., 1890), 42 N. W. Rep. 849. An unauthorized communication by the attorney to a person against whom the client intends to bring suit is not binding on him. Salomon, etc. Co. v. Jones, 34 Kan. 443. So the malice of plaintiff in an attachment suit cannot be shown by the admissions of his attorney. Floyd v. Hamilton, 33 Ala. 235.

⁴ Proctor v. Old Colony R. Co., 28 N. E. Rep. 13; Morris v. Balkham, 12 S. W. Rep. 970; 75 Tex. 111; Jane-way v. Skerritt, 30 N. J. L. 97; Marshall v. Cliff, 4 Camp. 133; Walden v. Bolton, 55 Mo. 405; Moffitt v. Wither-

spoon, 10 Ired. L. 185; Murray v. Chase, 134 Mass. 92; Reineman v. Blair, 96 Pa. St. 153. If the attorney is authorized to speak for his client, the admission of the attorney's clerk is the admission of the attorney. Taylor v. Williams, 2 B. & Ad. 845; Griffith v. Williams, 1 T. R. 710. An admission of the truth of a fact by an attorney in one suit is admissible in another suit only where the client authorizes it by his acquiescence in it. Nichols v. Jones, 32 Mo. App. 657; Morris v. Balkham, 75 Tex. 111.

⁵ See *post*, § 83; Wilson v. Spring, 64 Ill. 18; Wheeler v. Alderman, 34 S. C. 533; Smith v. Milliken, 2 Minn. 319.

⁶ See §§ 82-84; Truby v. Seybert, 12 Pa. St. 101; Floyd v. Hamilton, 23 Ala. 235; People v. Garcia, 25 Cal. 531; Moulton v. Bowker, 59 N. Y. 533; Cassels v. Usry, 51 Ga. 621; Bathgate v. Haskin, 59 N. Y. 533.

§ 75. Offers of compromise — Admissions under duress.— Admissions involved in overtures for a settlement of litigation or in offers of compromise understood to be without prejudice will not be admissible in evidence against a party.¹ Evidence of an offer to pay a sum of money to stop litigation or buy peace, without reference to the justice of the demand, is always rejected on grounds of public policy and from the fact that such evidence is usually wholly irrelevant.²

If the admission of a collateral fact tends to admit the merits of the case, it may be presumed from the circumstances that the admission was confidential and without prejudice, and an agreement will be implied that it was not to be used against the party.³

¹ *Huetteman v. Viesselmann*, 48 Mo. App. 582; *Darby v. Roberts* (Tex., 1893), 22 S. W. Rep. 529; *Hand v. Swann*, 1 Tex. Civ. App. 241; *York v. Conde*, 66 Hun, 316; *Olson v. Peterson*, 33 Neb. 358; *Smith v. Whittier*, 95 Cal. 279; *West v. Smith*, 101 U. S. 263; *Perkins v. Concord Road*, 44 N. H. 223; *Daniels v. Woonsocket*, 11 R. I. 4; *Gay v. Bates*, 99 Mass. 263; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Duff v. Duff*, 71 Cal. 513; *Jackson v. Clopton*, 66 Ala. 29; *Gommersol v. Crew*, 10 N. Y. S. 231; *Daily v. Coons*, 64 Ind. 545; *Mundhenk v. Central Iowa R. Co.*, 57 Iowa, 718; *Campau v. Dubois*, 39 Mich. 274; *State Bank v. Dutton*, 11 Wis. 271; *Patrick v. Crowe*, 15 Colo. 543; *Keaton v. Mayo*, 71 Ga. 649; *Barker v. Bushnell*, 75 Ill. 220. As to power of attorney to compromise, see § 74. *Contra*, *McElwee v. Trowbridge*, 68 Hun, 28. Whether a payment of a claim is an admission of its justice or a mere purchase of peace is a question of fact to be determined by the court. *Colburn v. Groton* (N. H., 1894), 28 Atl. Rep. 95.

² *Davey v. Lohrman*, 14 N. Y. S. 922; *Davis v. Simmons*, 25 Pac. Rep. 535; *Eldridge v. Hargreaves*, 30 Neb.

638; 46 N. W. Rep. 923; *International Co. v. Ragsdale*, 67 Tex. 27; *Barker v. Bushnell*, 75 Ill. 220; *Strong v. Stuart*, 9 Heisk. 137; *Williams v. State*, 52 Ala. 411; *Draper v. Hatfield*, 124 Mass. 53; *Daniels v. Woonsocket*, 11 R. I. 4; *Hood v. Tyner*, 3 Ind. App. 51; *Cooper v. Jones*, 79 Ga. 379; *Manistee Bank v. Sprague*, 64 Mich. 59; *Louisville, etc. Co. v. Wright*, 115 Ind. 378; *West v. Smith*, 101 U. S. 273. An admission of an independent or collateral fact not involving the merits of the case will be received against the party making the offer unless the whole offer was expressly without prejudice. *Fuller v. Hampton*, 5 Conn. 416; *Akers v. Kirk* (Ga., 1894), 18 S. E. Rep. 366; *Mayor v. Howard*, 6 Ga. 213; *Doon v. Ravey*, 49 Vt. 293; *Cates v. Kellogg*, 9 Ind. 506; *Arthur v. James*, 28 Pa. St. 236; *Church v. State*, 1 A. K. Marsh. (Ky.) 328; *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 446; *Plumer v. Currier*, 53 N. H. 287; *Cole v. Cole*, 33 Me. 542; *Garner v. Myrick*, 30 Miss. 448; *West v. Smith*, 101 U. S. 273; *Home Ins. Co. v. Baltimore W. Co.*, 93 id. 548.

³ *White v. Old Dom. S. Co.*, 102 N. Y. 662; *Brice v. Bauer*, 108 id.

While confessions in criminal cases must be entirely free and involuntary,¹ admissions are not rejected because made under compulsion or constraint. But the influence must be legal, and any compulsion amounting to duress or undue influence either in law or equity would render an admission so obtained inadmissible. The fact that it was elicited on cross-examination in reply to questions which the witness answered voluntarily, but which he might have refused to answer, will not render it inadmissible.²

§ 76. Admissions in pleadings.—In considering how far a party is bound by statements or admissions made in pleadings, the fairest and most satisfactory criterion is the amount of his actual knowledge of the contents of those documents. If it appears *prima facie* that the pleadings were signed and filed by the attorney (particularly when they are formal only), and there is nothing to show that the client had personal knowledge of their contents, generally he will not be bound.³ This rule, while sustained by the weight of the decisions and by reason and good sense, is not universal. The contrary presumption, that a pleading, even though formal and signed

433; Home Ins. Co. v. Balt. Warehouse Co., 93 U. S. 548; Campau v. Dubois, 39 Mich. 274; West v. Smith, 101 U. S. 263. *Contra*, Kahn v. Insurance Co. (Wyo., 1894), 34 Pac. Rep. 1059; Ashlock v. Linder, 50 Ill. 159; 1 Greenl. Evid., § 192. But evidence is admissible to show the fact of a compromise having been made or attempted where the question is not upon the merits, but whether a compromise was attempted or effected. Jones v. Foxall, 15 Beav. 338; Collier v. Mokes, 2 C. & K. 1012; Whitney Wagon Works v. Moore (Vt., 1890), 17 Atl. Rep. 1007. The reply to a letter offering to compromise is not receivable as an admission, though it may not have been marked without prejudice if the letter was so marked. Hoghten v. Hoghten, 15 Beav. 321.

¹ See *post*, § 89.

² Collett v. Keith, 4 Esp. 212; 4 *id.*

171; Newhall v. Jenkins, 2 Gray, 562; Tilley v. Damon, 11 Cush. (Mass.) 247.

³ Eaton v. Telegraph Co., 68 Me. 63; Callan v. McDaniel, 72 Ala. 96; Guy v. Manuel, 89 N. C. 83; Smith v. Davidson, 41 Fed. Rep. 172; State v. Samuels, 28 Mo. App. 649; Watson v. Lemon, 9 Colo. 200; Board of Com'rs v. Diebold S. & L. Co., 133 U. S. 473; Dennie v. Williams, 135 Mass. 28; Meade v. Black, 22 Wis. 232; Ferris v. Hard, 135 N. Y. 354; Delaware County v. Diebold Safe Co., 133 U. S. 487; Pope v. Allis, 115 U. S. 363; Scholl v. Bradstreet (Iowa, 1892), 52 N. W. Rep. 500; Kentucky v. I. Cent. Co. (Ind., 1892), 30 N. E. Rep. 802; Hamilton v. Patrick, 63 Hun, 74; Grimmer v. Carlton, 93 Cal. 189; Hall v. Brennan, 19 N. Y. S. 623; Halpin v. Manny, 33 Mo. App. 388.

by the attorney, and containing no specific allegation of fact, was within the knowledge of the party and may be used as his admission, is supported by many cases.¹

Where a party has sworn to his pleadings,² or if they were drawn by his express directions, or where they contain matter not merely formal but specifically and particularly descriptive of facts which must have been within the personal knowledge of the party, and which could not have been inserted by the attorney acting only under general instructions, he will be conclusively presumed to have been fully informed as to all statements contained therein, and they will be competent as his admissions.³

As regards the admissibility of admissions contained in the pleadings in the suit in which they are filed, it is a general rule, confirmed by statute in some states, that the pleadings are not evidence nor open to comment or criticism by counsel. The pleadings are considered in the light of technical formulas, not importing absolute veracity in their contents, but are meant to define the issue and facilitate the labors of the jurors in arriving at a conclusion.⁴

¹ *Smith v. Pelott*, 68 Hun, 632; *Coward v. Clanton*, 79 Cal. 29; *Vogel v. Osborne*, 32 Minn. 167; *Rich v. Minneapolis*, 40 Minn. 84; *Lamar v. Pearce*, 17 S. E. Rep. 92; *Soaps v. Eichberg*, 42 Ill. App. 375; *Ballock v. Hooper*, 146 U. S. 363; *Crump v. Gerick*, 40 Miss. 765; *Buzard v. McAnulty*, 77 Tex. 438; *Kankakee, etc. Co. v. Horan* (Ill., 1890), 23 N. E. Rep. 621; *Baily v. O'Bannon*, 28 Mo. App. 39; *Beale v. Brown*, 6 Mackey, 574; *Wheeler v. West*, 71 Cal. 126; *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *McCormick M. Co. v. Snell*, 23 Ill. App. 79. An original pleading which has been superseded by an amended one is not admissible as an admission. *Wheeler v. West*, 71 Cal. 126. *Contra*, *Baily v. O'Bannon*, 28 Mo. App. 39.

² *National S. S. Co. v. Tugman*, 143 U. S. 28; *Murphy v. St. Louis Type*

Foundry, supra; *Cook v. Barr*, 44 N. Y. 156; *Asbach v. Railroad Co.* (Iowa, 1892), 53 N. W. Rep. 90.

³ *Spencer v. Fortesque*, 16 S. E. Rep. 898; *Nichols v. Jones*, 32 Mo. App. 664; *Central R. R. Co. v. Stoller*, 51 Fed. Rep. 518; *Johnson v. Russell*, 144 Mass. 409; *Eaton v. Telegraph Co.*, 68 Me. 63; *Judd v. Gibbs*, 3 Gray (Mass.), 539; *Lillis v. Erin Ditch Co.*, 95 Cal. 553; *State v. Littlefield*, 3 R. I. 124; *Buzard v. McAnulty*, 77 Tex. 445; *Woods v. Graves*, 144 Mass. 365; *Miller v. James* (Iowa, 1893), 53 N. W. Rep. 227.

⁴ See *Gould, Plead.*, pp. 4-10; *Phillips v. Smith*, 110 Mass. 61; *Taft v. Fiske*, 140 Mass. 250. Where the admission is contained in one clause of a pleading, the party has a right to claim that a clause qualifying it shall be read. *Spencer v. Fortescue* (N. C., 1893), 16 S. E. Rep. 898. *Cf. Parker v. Lanier*, 82 Ga. 216.

The answer of an administrator to interrogatories in a bill in equity will not bind the estate;¹ nor is the answer of a defendant in a court of equity generally admissible against his co-defendants,² though where there is a real and joint interest between the parties, or where an actual privity of interest exists, the answer of one defendant, relating to the common undertaking, as in cases of partnership, is an admission by which the others will be bound.³

Declarations in an answer filed in a court of chancery are admissible against a sole defendant, even though the answer is withdrawn or abandoned by him,⁴ or stricken out on motion.⁵

§ 77. Admissions by reference — Awards of arbitrators. Where a party has referred another to a third person not interested or in privity with either, the party referring will be bound by any statements the referee shall make pertaining to the subject-matter. The statement of the referee is considered the admission of the person referring.⁶ The statements and replies will only be regarded as the admissions of the party so far as they convey information relative to the facts which constitute the subject of the inquiry.⁷

This principle is applicable to awards. If a controversy is submitted to arbitrators chosen for the purpose of bringing

¹ *Crandall v. Gallup*, 12 Conn. 565; *Dent v. Dent*, 3 Gill (Md.), 482; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 398; *Marshall v. Adams*, 11 Ill. 37. A demurrer to a bill in equity, in order to be used as an admission of the facts stated in the bill, must have been adjudged insufficient. *Kanka-kee, etc. Co. v. Horan*, 131 Ill. 288; 23 N. E. Rep. 621. Cf. *post*, § 303.

² *Leeds v. Marine Ins. Co.*, 2 Wheat. 380; *Field v. Holland*, 6 Cranch, 8; *Morris v. Nixon*, 1 How. (S. C.) 118; *McElroy v. Ludlum*, 32 N. J. Eq. 245. In equity, if the complainant waives the respondent's oath, a sworn answer has only the force of an affidavit. *United States v. Council*, 54 Fed. Rep. 994. See *post*, § 303.

³ See *ante*, § 66; *Field v. Holland*, 6 Cranch, 8; *Clark's Ex'rs v. Riems-*

dyk, 9 Cranch, 153, 156; *Hartley v. Mathews* (Ala., 1890), 11 S. Rep. 452.

⁴ *Brown v. Pickard*, 4 Utah, 292; *Daub v. Engelback*, 109 Ill. 267.

⁵ *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Fite v. Black* (Ga., 1893), 17 S. E. Rep. 349.

⁶ *Chapman v. Twitchell*, 37 Me. 59. The word "referee," as thus used, means a person to whom a voluntary reference is made and not one appointed by the court as a substitute for a jury.

⁷ *Barnard v. Macy*, 11 Ind. 536; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561; *Lambert v. People*, 6 Abb. N. C. (N. Y.) 181; *Allen v. Killinger*, 8 Wall. (U. S.) 480; *Over v. Schiffing*, 102 Ind. 191 (master referring to servant).

about a fair settlement and to avoid future litigation, the result of the arbitration will be conclusive and will be regarded as the admissions of the parties referring, unless corruption or partiality or gross fraud, collusion or mistake is shown.¹

An arbitrator or referee may testify to what matters were referred to him.² But where the award is in writing it is considered as the written admission of both parties, and neither will be allowed to contradict or vary its terms by the parol evidence of the arbitrator.³ On the other hand, an award may be set aside if *prima facie* irregular, uncertain or lacking in mutuality,⁴ or if it appears upon its face to have been rendered upon *ex parte*, improper or grossly insufficient evidence.⁵ Generally, however, an arbitrator to whom the parties have voluntarily referred a controversy is not bound by strict legal rules as to the reception of evidence. He may, in his discretion, receive evidence which would be inadmissible in a court, provided he keeps within the limits of the subject-matter referred, and the reception by him of such evidence is

¹ *Wade v. Powell*, 31 Ga. 1; *N. Y. Lumber, etc. Co. v. Schneider*, 119 N. Y. 475; *Davy v. Faw*, 7 Cranch (U. S.), 171; *Overly v. Thrasher*, 47 id. 10; *Sherfey v. Graham*, 72 Ill. 158; *Golder v. Mueller*, 23 Ill. App. 527; *Kendrick v. Turbell*, 26 Vt. 416; *Harris v. So. Mfg. Co.*, 8 R. I. 133; *Carter v. Carter*, 100 Mass. 309; *State v. Appleby*, 25 S. C. 500; *McDowell v. Thomas*, 4 Neb. 542; *Cooper v. Andrews*, 44 Mich. 94; *Pierce v. Pierce*, 60 N. H. 355; *Sisson v. Baltimore*, 51 Md. 83; *Jenkins v. Meagher*, 46 Miss. 84; *Crumlish v. Wilmington*, 5 Del. Ch. 270; *Cushing v. Babcock*, 38 Me. 452; *Halstead v. Seaman*, 52 How. Pr. (N. Y.) 415; *Bennett v. Russell*, 34 Mo. 524; *Young v. Laird*, 30 Ala. 371.

² *Hawksworth v. Brammell*, 5 M. & Cr. 281; *Hale v. Huse*, 10 Gray (Mass.), 99; *Thrasher v. Overly*, 51 Ga. 91.

³ *Cobb v. Dortch*, 52 Ga. 548; *Aldrich v. Jessiman*, 8 N. H. 516; *Alex-*

ander v. McNear, 28 Fed. Rep. 403; *Mulligan v. Perry*, 64 Ga. 567; *Kings-ton v. Kincaid*, 1 Wash. (U. S.) 448; *Ward v. Gould*, 5 Pick. 29; *Chapman v. Ewing*, 78 Ala. 403. See *post*, § 205 et seq.

⁴ *Blackledge v. Simpson*, 2 Hayw. (S. C.) 30; *Purdy v. Delavan*, 1 Caines, 304; *Weed v. Ellis*, 2 id. 254; *Spofford v. Spofford*, 10 N. H. 254; *Gilson v. Powell*, 13 Miss. 712; *Hanson v. Weber*, 40 Me. 194.

⁵ *Conrad v. Mass. I. Co.*, 4 Allen (Mass.), 20; *Hogaboom v. Herrick*, 4 Vt. 131; *Fluharty v. Beatty*, 22 W. Va. 698; *Thompson v. Blanchard*, 2 Iowa, 44; *Cutting v. Carter*, 29 Vt. 72. The party impeaching an award upon the grounds that evidence had been improperly excluded must have objected at the time of its exclusion (*Patten v. Hunnewell*, 8 Me. 19), and must show that the evidence would have been pertinent and material. *Halsted v. Seaman*, 52 How. Pr. (N. Y.) 415.

in good faith and does not result in any substantial injustice to either of the parties.¹

Under the rule above explained, that where a party has referred another to a third person, the latter has power to bind the party referring by his statements relating to the subject-matter, is included the case of an interpreter who participates in an interview between the parties. Either party may testify to the statements of the interpreter, which is under such circumstances equivalent to the admission of the adversary.²

§ 78. Admissions from conduct and assumed character.—This class of admissions is of extensive application, but in the main as admissions by conduct are rather to be regarded as forming a part of the law of equitable estoppel, the principles upon which they are admitted as a part of the law of evidence is of doubtful correctness. They will be found elsewhere treated under their appropriate head.³

§ 79. Self-serving declarations.—The admissions of a party, being presumably against his interest, may be given in evidence by any one who heard them. But a party cannot claim the same for statements made by him in his own favor. Such declarations cannot be testified to by third persons as substantive evidence of the facts therein stated, and if they are to be produced in evidence the party himself must go upon the stand.⁴ If the declaration is made in the presence

¹Hooper v. Taylor, 39 Me. 224; 451; Ward v. Ward, 37 Mich. 253; Fennimore v. Childs, 1 Halst. (N. J.) 386; Maynard v. Frederick, 7 Cush. 246; Shaifer v. Baker, 38 Ga. 135; Bassett v. Cunningham, 9 Gratt. (Va.) 684; Campbell v. Western, 3 Paige (N. Y.), 124; Pike v. Gage, 9 Fost. (N. H.) 461; Chesley v. Chesley, 10 N. H. 327; McCrae v. Robeson, 2 Murph. (N. C.) 127. But evidence as to a claim which is not legally enforceable should be rejected by the arbitrator. De La Riva v. Berreysea, 2 Cal. 195.

²Nadau v. White River Lumber Co. (Wis., 1890), 43 N. W. Rep. 1035.

³See *post*, §§ 83, 84.

⁴Whitney v. Houghton, 125 Mass.

In re Bronson, 67 Hun, 237; Bement v. May (Ind., 1893), 34 N. E. Rep. 327; Hammond v. Beeson, 112 Mo. 190; Smith v. Wilson, 1 Tex. Civ. App. 115; Schmidt v. Packard, 132 Ind. 398; Alexander v. Handley, 11 S. Rep. 390; Shiner v. Abbie, 77 Tex. 1; Melcher v. Derkum, 44 Mo. App. 650; Steel v. Shafer, 39 Ill. App. 185; Thomas, Adm'r, v. Lewis (Va., 1892), 15 S. E. Rep. 389; Saenger v. Nightingale, 48 Fed. Rep. 708; Cherry v. Butler, 17 S. W. Rep. 1090; Tisch v. Utz, 142 Pa. St. 186; Schwab v. Heindel, 16 Daly, 164; Welch v. Palmer, 85 Mich. 310; Baily v. Pardridge, 134 Ill. 188.

and hearing¹ of the other party or of his agent, in a way and under such circumstances that required him to reply, deny or qualify the truth of the facts asserted, it is no longer inadmissible as self-serving and hearsay, but as adopted and ratified by the party hearing it, and is receivable as his admission.² The statement must not only have been made in the presence of the party, but the language used must have been fully understood before his silence can be construed into an admission.³ Thus, if he is a foreigner not thoroughly conversant with the language, it must be shown that an interpreter was present and that the meaning of the words used was explained to him.⁴ The circumstances of the conversation should have been such as would naturally demand a denial or reply,⁵ for no man is called upon to enter into useless discussion or to meet every vague, hasty or extravagant assertion concerning his rights that is made in his hearing,⁶ whether it be addressed to him or to third persons. So no man is under any sort of necessity or obligation to answer questions put to him without knowing their purpose and object; and where questions seriously affecting one's own interest are put by an adversary, the right of the questioner to the knowledge must be shown before silence or an express refusal to answer should be construed into a damaging admission.⁷

¹ In all cases of this class the presence of the person to be affected is a very material element. *Martin v. Capital Ins. Co.* (Iowa, 1892), 52 N. W. Rep. 534; *Gainsey v. Rhodes*, 63 Hun, 632; *Dawson v. Schloss*, 93 Cal. 134; *Taliaferro v. Goudelock*, 82 Tex. 521; *Simonds v. Partridge*, 154 Mass. 500; *Sanscraints v. Torongo*, 87 Mich. 69; *Downing v. Iron Co.*, 93 Ala. 262; *Cain v. Cain*, 140 Pa. St. 144; *Farrell v. Weitz* (Mass., 1894), 35 N. E. Rep. 783.

² *Des Moines Sav. Bank v. Hotel Co.* (Iowa, 1893), 55 N. W. Rep. 67; *Evans v. Montgomery* (Mich., 1893), 55 id. 362; *Giles v. Vandiver*, 17 S. E. Rep. 115; *Clafin v. Rodenburg* (Ala., 1893), 13 S. Rep. 272; *Thompson v. Thompson* (Ky., 1893), 20 S.

W. Rep. 373; *Hunt v. Johnson*, 11 S. Rep. 387. If a party's declarations are admitted in his own favor, they should be confined to corroboration alone. *Sprague v. Bond* (N. C., 1894), 18 S. E. Rep. 701.

³ *Riley v. Martinelli* (Cal., 1893), 33 Pac. Rep. 579.

⁴ *Wright v. Maseras*, 56 Barb. 521.

⁵ *Giles v. Vandiver*, 17 S. E. Rep. 115.

⁶ *Whitney v. Houghton*, 127 Mass. 527; *Siva v. Wabash Ry. Co.* (Mo., 1893), 21 S. W. Rep. 915.

⁷ *Des Moines Bank v. Hotel Co.* (Iowa, 1893), 55 N. W. Rep. 67; *Brainard v. Buck*, 25 Vt. 573; *Corser v. Paul*, 41 N. H. 24; *Blanchard v. Evans*, 55 N. Y. Super. Ct. 543; *Pierce v. Goldsburg*, 35 Ind. 317;

So admissions which are inferred from silence should be and are received with caution, the very liberal policy as to their reception which obtained in the earlier cases being no longer countenanced. Subject to this precaution and having in view the facility with which evil-disposed persons may abuse the principle here involved by the employment of denunciation or offensive or scurrilous language or impertinent questions towards their adversary and in his hearing, admissions implied by silence are receivable against the party. -

So where a tenant receives notice to quit¹ without objection, or where an account is rendered to the debtor and not promptly objected to by him,² the silence of the parties will be received as an admission of the correctness of the notice or account.

So where books or documents are proved to have been in the possession of a person, or where it is known that he had or could have had constant access to them either personally or by his agent, it will be presumed that he inspected them and has acquired a knowledge of their contents. Under such circumstances his silence or failure to object promptly to the accuracy of the entries, so far as they affect his interest and so far as the circumstances call for an objection on his part, will make the statements of fact contained in the writings competent as his admissions.³

People v. Driscoll, 107 N. Y. 424; Wilkins v. Stidger, 22 Cal. 231; Dury v. Hervey, 126 Mass. 517; Vail v. Strong, 10 Vt. 457; Higgins v. Dellinger, 22 Mo. 397; Hackett v. Colender, 32 Vt. 97; McClenkan v. McMillan, 6 Barr. 366; Com. v. Call, 21 Pick. 515; Com. v. Kenney, 12 Metc. 235; Hildreth v. Martin, 3 Allen (Mass.), 371; Com. v. Densmore, 12 id. 535; 1 Greenl. on Evid., § 197.
¹ Cons. Coal Co. v. Schaefer, 31 Ill. App. 364.

² Freeland v. Herron, 7 Cranch, 147, 151; House v. Beak, 43 Ill. App. 615; 141 Ill. 290; Mackin v. O'Brien, 33 id. 474; Fleishner v. Kubli, 20 Oreg. 323; 25 Pac. Rep. 1086; McCormack

v. Sawyer, 15 S. W. Rep. 998; 104 Mo. 36.

³ Kirwan v. Henry (Ky., 1890), 16 S. W. Rep. 823; Fenno v. Weston, 31 Vt. 345; Coe v. Hutton, 1 S. & R. 398; Corps v. Robinson, 2 Wash. C. C. 388; McBride v. Watts, 1 McCord, 384; Allen v. Coit, 6 Hill (N. Y.), 318. See 1 Greenl. on Evid., § 197. But statements in unanswered letters in the parties' possession, where no reply was reasonably required by circumstances, cannot be received against the person addressed. Waring v. U. S. Tel. Co., 44 How. (N. Y.) 69; 4 Daly, 233; Com. v. Eastman, 1 Cush. (Mass.) 189; Richardson v. Frankum, 9 C. & P.

§ 80. **Mode of proof**—**Nature of the admission.**—Admissions by third persons in privity with the party against whom they are offered may be shown by the testimony of any competent witness who was present and has heard them.¹ The main fact is rather the actual making of the declaration than its truth or falsity, so that evidence is always receivable on the part of the persons against whom the admission is introduced to show either that he did not make it, or, if it was made by third persons, that the statements of fact contained in it are not true.² It is sufficient if the substance of the admission be stated,³ though in any case the whole of the declaration relating to the same subject must be introduced in order that its credibility may be determined by the jury after a careful comparison and weighing of those parts which are favorable with those that are adverse to the party.⁴

In case letters forming a correspondence are introduced by the plaintiff, the defendant may read his own answer to plaintiff's last letter.⁵

The credibility or weight of the admissions is always a question for the jury. All parts of the declaration may

221; *Talcott v. Harris*, 93 N. Y. 567, 571; *Leonard v. Tillotson*, 97 N. Y. 8, cited in 1 *Greenl. on Evid.*, § 197.

¹ *Miller v. Wood*, 44 Vt. 378; *Wilcox v. Green*, 28 Conn. 572; *Shepp v. State*, 31 Tex. Crim. Rep. 349; *Green v. Cawthorn*, 4 Dev. L. (N. C.) 409; *Com. v. Griffin*, 110 Mass. 181; *Obermann Brew. Co. v. Adams*, 35 Ill. App. 540; *Seers v. So. R. Co.* (Mo., 1891), 18 S. W. Rep. 1007. He should be required to identify the person making the admissions or declarations where their admissibility depends on their being made by a particular person. *Smith v. Williams*, 15 S. E. Rep. 130.

² *O'Bannon v. Vigus*, 32 Ill. App. 473.

³ *Kittridge v. Russell*, 114 Mass. 67.

⁴ See, also, "Confessions," §§ 93, 94; *Wilson v. Calvert*, 8 Ala. 757; *Trammel v. Bassett*, 24 Ark. 499; *Barnum v. Barnum*, 9 Conn. 242; *People v.*

Murphy, 39 Cal. 52; *Morris v. Stokes*, 24 Ga. 552; *Moore v. Wright*, 90 Ill. 470; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; *Turner v. Jenkins*, 1 H. & J. (Md.) 161; *Storer v. Gowen*, 18 Me. 174; *Witwell v. Wyer*, 11 Mass. 6; *Perego v. Purdy*, 1 Hilton, 269; *Bristol v. Warner*, 19 Conn. 7; *Simmons v. Haas*, 56 Md. 153; *Searles v. Thompson*, 18 Minn. 316; *Adams v. Eames*, 107 Mass. 275; *Kelsey v. Busch*, 2 Hill (N. Y.), 440; *Devlyn v. Killcrease*, 2 McMull. (S. C.) 425. A copy of a written statement made to a witness by a party is primary evidence of the admissions therein if its correctness is verified by the witness who made it. *Butler v. Cornell* (Ill., 1894), 35 N. E. Rep. 767.

⁵ *Roe v. Day*, 7 C. & P. 705. So where a letter which is alleged to be in answer to another letter is offered, the latter must also be produced. *Watson v. Moore*, 1 C. & Kir. 626.

not be equally credible, and they may refuse to believe any part of it and may reject the part unfavorable to the party against whom it is offered and believe that which is in his favor.¹ Statements wholly distinct from the admission need not be shown;² nor need the witness in testifying to the admission be asked concerning contradictory statements which have been made later.³

Where the witness was present during only part of the conversation in which the admission was made, he may testify to that part which he has heard,⁴ and other parts of that conversation relating to and qualifying it may be shown by the adverse party; as, by putting an admission in evidence, all that was said at the time necessary to comprehend it is rendered admissible.⁵

Although all admissions are hearsay so far as the witness himself is concerned, a distinction is made in their character as viewed from the standpoint of the party who uttered them and who might, if on the witness stand, be able to testify to their contents of his own personal knowledge. If the admission assumes to be a statement of some fact, the whole of it will be binding upon the party in the same manner as though it were an actual statement of fact, though it appears that a portion of it is not in the personal knowledge of the person making it, and is derived from the information of others. But where the statement is expressly made on information

¹ *Ayers v. Metcalfe*, 39 Ill. 307; *Licett v. State*, 23 Ga. 57; *Pearson v. Sabin*, 10 N. H. 205; *Newcomb v. Jones*, 37 Mo. App. 475; *Mattocks v. Lyman*, 18 Vt. 98; *Roberts v. McGee*, 15 Barb. 449; *Brown's Case*, 9 Leigh, 633; *Yarborough v. Moss*, 9 Ala. 382; *Whitwell v. Wyer*, 11 Mass. 6, 10.

² *Darby v. Ouseley*, 1 H. & N. 1; *Sturge v. Buchanan*, 2 M. & R. 90. Cf. *Lamar v. Pearce* (Ga., 1893), 17 S. E. Rep. 92. But an admission cannot prevail over an agreed statement of facts. *Adams v. Eichenberger* (Ark., 1893), 18 S. W. Rep. 853.

³ *People v. Green*, 1 Park. Cr. Cas.

11; *Edward v. Ford*, 2 Bailey (S. C.), 461; *Hatch v. Potter*, 2 Gilm. (Ill.) 725. See *post*, § 342a.

⁴ *Williams v. Kaiser*, 11 Fla. 234; *State v. Pratt*, 88 N. C. 639; *Denver, etc. Co. v. Neis*, 56 Cal. 56; *Mays v. Deaver*, 1 Iowa, 260; *State v. Covington*, 2 Bailey (S. C.), 569; *Westmoreland v. State*, 45 Ga. 225. Admissions which are competent are not rendered inadmissible because the party contradicts them. *Griffith v. Sauls* (Tex., 1890), 14 S. W. Rep. 230.

⁵ *Moore v. Wright*, 90 Ill. 470; *Gildersleeve v. Mahoney*, 5 Duer, 383; *Pennell v. Meyer*, 8 C. & P. 470.

and belief, it will be inadmissible either against the party or in his favor.¹

Verbal admissions are not generally admissible to prove those facts which, under the circumstances or by some rule of law, can only be properly proved by written evidence,² unless the loss of the writing be shown or its absence be accounted for.³

§ 81. Weight and sufficiency of admissions.—The somewhat unreliable character of verbal admissions, made often hastily and inadvertently or in casual conversation, has been often adverted to.⁴ The language used may have been misunderstood, or not understood at all by the witness, or it may be perverted by him who testifies through passion or prejudice or because unable to recollect the language used. For several eye-witnesses to give different accounts of the same occurrence which they saw is very common. Where language is to be repeated, only those who are skilled in detecting the niceties of meaning which attach to many words and phrases will be able to narrate correctly even the substance of what they have heard. So the witness may allow knowledge of facts which he has subsequently ascertained to color and distort the meaning of the language which was employed and which he heard. Upon the whole, the unsubstantial character of this sort of evidence is such that it is only receivable from the necessity of the case and in the absence of evidence of a more reliable character.

§ 82. Admissions, when conclusive — Mistake.—Judicial admissions in the form of express stipulations by the party or his attorney, which, on being filed, become a part of the rec-

¹ *Roe v. Ferrais*, 2 B. & P. 548 (applying the rule to an answer in chancery); *Chaddock v. Clifton*, 22 Wis. 115; *Stephens v. Vroman*, 16 N. Y. 301. *Cf.* *Chapman v. Chicago*, etc. Co., 26 Wis. 295. See as to personal knowledge, § 50.

² *Walker v. Dunspaugh*, 20 N. Y. 170; *Jenner v. Jolliffe*, 6 Johns. 9; *Jackson v. Miller*, 6 Cow. 751, 755; *Jackson v. Cary*, 16 Johns. 306; *Wel-*

land Canal Co. v. Hathaway, 8 Wend. 480; *McPhaul v. Gilchrist*, 7 Ired. (N. C.) L. 169; *Scott v. Clare*, 3 Campb. 236; *Sykes v. Hayes*, 5 Biss. 529; *Newhall v. Holt*, 6 M. & W. 662. But *cf.* *Jackson v. Dobbin*, 3 Johns. 223; *Earle v. Picken*, 5 C. & P. 542. See *ante*, §§ 30-33, 37.

³ See *post*, §§ 130, 133.

⁴ *Richmond, etc. Co. v. Kerler*, 88 Ga. 39.

ords of the court, or payment of money into court, are conclusive of all the facts either directly or incidentally involved.¹ Thus, by payment into court, the party admits the amount of the indebtedness,² that it is due,³ as well as the jurisdiction of the court,⁴ and the capacity⁵ of his adversary to sue. So the sufficiency of the pleading is also admitted.⁶ So, also, express admissions of facts contained in a party's pleadings are usually conclusive upon him, constituting as they do a legal estoppel of record.⁷

While judicial admissions becoming a part of the record are regarded as conclusive, admissions out of court are not generally so regarded as to the facts contained therein, unless by means of the admission the conduct of some other person has been so influenced that he has altered his condition to such an extent that he will be damaged by allowing their falsity to be shown.⁸ The admission may then be regarded as working an estoppel upon the party making it.⁹ But estoppels differ

¹ See *ante*, §§ 74-76.

² *Boyden v. Moore*, 5 Mass. 365, 369.

³ *Jones v. Hoar*, 5 Pick. 285; *Cons. Gas Co. v. Harless* (Ind., 1891), 29 N. E. Rep. 1002.

⁴ *Miller v. Williams*, 5 Esp. 19, 21.

⁵ *Lipscombe v. Holmes*, 2 Campb. 441.

⁶ *Randall v. Lynch*, 2 Camp. 352, 357. See, also, *Baker v. Charlton*, 7 Cush. 581.

⁷ *Bowers v. Smith*, 8 N. Y. S. 226; *Simis v. Davidson*, 54 N. Y. Super. Ct. 235; *Sheehan v. Loler*, 36 Mo. App. 224.

⁸ *Bank v. Natchez*, 3 Rob. (La.) 293; *Newton v. Belcher*, 12 Q. B. 921; *Reed v. Newcomb* (Vt., 1890), 19 Atl. Rep. 367; *Kinney v. Farnsworth*, 17 Conn. 355; *O'Bannon v. Vigus*, 32 Ill. App. 473; *Newcomb v. Jones*, 37 Mo. App. 475; *Louisville, E. & St. L. Co. v. Berry* (Ind., 1894), 35 N. E. Rep. 565. An admission of payment of consideration in a deed is not conclusive. See § 203. So an admission contained in an alleged agreement is

not binding as an estoppel. *Josey v. Davis*, 55 Ark. 318.

⁹ "To constitute such an estoppel a party must have designedly made an admission inconsistent with the defense or claim he proposes to set up, and another party have with his knowledge and consent so acted on that admission that he will be injured by allowing that admission to be disproved." *Cooley, J., in Hawes v. Marchant*, 1 Curt. C. C. 144. So in *Heane v. Rogers*, 9 B. & C. 577, 586, the court said: "There is no doubt but that the express admissions of a party to the suit or admissions implied from his conduct are evidence and strong evidence against him: but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case a party is estopped from disputing their truth with respect to that person (and those claiming under

from admissions in that the former, being a legal defense, must be specially pleaded, the facts which are to support them being given in evidence; though they resemble admissions in that they are binding only upon privies or upon parties among or between whom a joint interest or privity exists.¹

An admission is always matter of evidence alone, and the facts admitted need not be pleaded, but are for the consideration of the jury. So, except perhaps in the case of judicial admissions or extra-judicial admissions under oath or in which gross fraud or crime is involved, the party may be allowed to rebut the truth of the statement or show that it was made under duress, or ignorantly or by mistake, or while intoxicated, in all cases where, not having been acted upon, the other party will not be prejudiced.²

§ 83. Estoppel defined.—Estoppels are divided into estoppels by deed—that is, by some admission or agreement contained in a valid sealed instrument; by record, which shows

him) and that transaction, but as to third persons he is not bound.”

¹ *Parker v. Crittenden*, 37 Conn. 148; *Gould v. West*, 32 Tex. 338; *Eaton v. N. E. Tel. Co.*, 68 Me. 63; *Wright v. Hazen*, 24 Vt. 143; *Thistle v. Buford*, 50 Mo. 278; *McCrawey v. Remsen*, 19 Ala. 430; *Peters v. Jones*, 35 Iowa, 412; *Kinnear v. Mackey*, 85 Ill. 96; *Simpson v. Pearson*, 31 Ind. 1; *Murray v. Sells*, 53 Ga. 257. That estoppels must be specially pleaded, see *Tyler v. Hall*, 106 Mo. 313; *Gooding v. Underwood*, 89 Mich. 187; *Wessels v. Bleaman*, 87 Mich. 481; *Vellum v. Demerle*, 65 Hun, 543; *Churchill v. Bowman*, 95 Cal. 54.

² *Kenton v. First Nat. Bank* (Ky., 1892), 19 S. W. Rep. 841; *Miller Hardw. Lumb. Co. v. Wilson* (Ark., 1892), 19 S. W. Rep. 974; *Tower v. Haslam*, 84 Me. 84; *Gooding v. Underwood*, 89 Mich. 187; *Wortham v. Thompson*, 81 Tex. 348; *Wright v. Weimeister*, 87 Mich. 494; *Stiff v. Ashton* (Mass., 1892), 29 N. E. Rep. 203; *Hill v. Wand*, 47 Kan. 340;

Thompson v. Thompson (Ky., 1893), 20 S. W. Rep. 873; *Holman v. Boyce* (Vt., 1893), 26 Atl. Rep. 832; *Watkins et al. v. Howeth*, 1 Tex. Civ. App. 277; *Board v. First Nat. Bank*, 24 N. Y. S. 392; *Platto v. Gettelman* (Wis., 1893), 55 N. W. Rep. 167; *Newcomb v. Jones*, 37 Mo. App. 475. The principles lying at the foundation of the doctrine of estoppel as it is now recognized both in law and equity are thus admirably summed up by the court in *Dickinson v. Colegrove*, 100 U. S. 580: “The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. A change of position would involve fraud and falsehood. The remedy is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.”

a final adjudication of a court of competent jurisdiction,¹ and estoppels *in pais*, or, using the modern term, equitable estoppels.

Estoppels are defined by Lord Coke as follows: "An estoppel is where a man is concluded by his own act or acceptance to say the truth."

In the case of most estoppels in law — that is, estoppels by deed or record — the truth is absolutely excluded without discriminating whether, in the particular case, its exclusion will work an injustice or not. An estoppel *in pais* or by conduct, so far at least as it is governed by equitable principles, is only allowed to exclude the truth when its assertion would be unjust to the person who has relied upon the statement or conduct of the party estopped.

In the case of strictly legal estoppels *in pais*, such as those, for example, which arise by an acceptance of rent or estate or by partition, the truth is excluded partly because of maxims of public policy and partly to obtain a consistent and unvarying administration of the law.²

In order to constitute a declaration or act an estoppel *in pais* there must have been a material misrepresentation of fact or a concealment of or silence respecting certain facts or circumstances which it was the duty of the party to make known.³

¹ See "Judgments," *post*, §§ 151-156.

² *Horn v. Cole*, 51 N. H. 287.

³ See Tiedeman on Equity, § 107 et seq.; *Eaton v. Tel. Co.*, 68 Me. 523; *People v. Brown*, 67 Ill. 435; *Home v. Cole*, 51 N. H. 287-290; *Stevens v. Dennett*, 51 N. H. 324; *Peters v. Jones*, 35 Iowa, 512; *Continental Bank v. Bank of Commonwealth*, 50 N. Y. 575; *Zechtmann v. Roberts*, 109 Mass. 53; *Reis v. Grafman*, 56 Mo. 434; *Oakland v. Rye*, 52 Cal. 270; *Viele v. Judson*, 82 N. Y. 32-39; *Hamlin v. Seers*, 82 N. Y. 327; *Comstock v. Smith*, 26 Mich. 306; *Abrams v. Seale*, 44 Ala. 297. "The meaning is not that equitable estoppels are cognizable only in courts of equity, for they are commonly enforced in

actions of law. But it does not follow because equitable estoppels may originate legal as distinguished from equitable rights, that it may not be necessary, in particular cases, to resort to a court of equity to make them available. All that can properly be said is that to justify a resort to a court of equity it is necessary to show some ground of equity other than the estoppel itself whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of law are used to defeat that which in equity constitutes the right." *Drexel v. Berney*, 122 U. S. 253.

If one is not under any obligation to speak, or if he has no reasonable opportunity to do so, his silence will not constitute an estoppel.¹ Thus the circulation of a plat or map upon which property is described as subdivided in blocks will not estop the owner when it is done without his knowledge.² On the other hand, where an owner of lands allows another to make improvements without warning him of his title,³ or allows another person to deal with his property as his own, he will be estopped against all persons who, relying upon his silence, have acquired any title to the property because of a belief in the validity of the title of the third person.⁴

The verbal statement of fact, in order to operate as an estoppel, must be distinct and clear,⁵ and must, as a general rule, pertain to some past or present event. In no case will a mere expression of opinion or of future intention, unless a contract be created, be binding as an estoppel.⁶

¹ *Rosenfield v. Fortier*, 94 Mich. 34; *Collier v. White* (Ala., 1893), 12 S. Rep. 385; *Mathews v. Alsworth* (La., 1893), 12 S. Rep. 578; *Diffenbach v. Vogeler*, 61 Md. 370; *Terre Haute v. Rodel*, 89 Ind. 128; *Veile v. Judson*, 82 N. Y. 32; *Bull v. Rowe*, 13 S. C. 355; *Bramble v. Kingbury*, 39 Ark. 131; *Mills v. Railroad Co.*, 41 N. J. Eq. 1.

² *Sullivan v. Davis*, 29 Kan. 28.

³ *Ware v. Smith* (Mass., 1892), 30 N. E. Rep. 869; *Planet, etc. Co. v. Railroad Co.* (Mo., 1893), 22 S. W. Rep. 616; *Town v. Peebles*, 5 Wash. St. 471; *Cross v. Kansas City*, 90 Mo. 13.

⁴ *Tiedeman on Equity*, § 109; *Dupree v. Woodruff* (Tex., 1892), 19 S. W. Rep. 469; *Long v. Kee* (La., 1892), 10 S. Rep. 854; *Foreman v. Weil* (Ala., 1893), 12 S. Rep. 815; *Stewart v. Armstrong*, 56 Fed. Rep. 167; *Lawrence v. Guaranty Co.* (Kan., 1893), 32 Pac. Rep. 816; *Mathews v. Morgan* (Iowa, 1893), 55 N. W. Rep. 478; *Mathews v. Culbertson* (Iowa, 1893), 50 id. 201; *Chapman v. Pingry*, 67 Maine, 198; *Hawkins v. Church*, 23 Minn. 256; *Roberts v. Davis*, 72

Ga. 819; *Redman v. Graham*, 80 N. C. 231; *Stewart v. Munford*, 91 Ill. 158; *Kirk v. Hamilton*, 102 U. S. 68.

⁵ *Graham v. Thompson*, 55 Ark. 296; *Townsend v. Todd*, 47 Conn. 190; *Moors v. Albro*, 129 Mass. 9; *Davenport v. Gas Co.*, 43 Iowa, 301; *Bennett v. Dean*, 41 Mich. 472; *Lash v. Rendall*, 72 Ind. 475; *Roach v. Brannon*, 57 Miss. 490; *Tillotson v. Mitchell*, 111 Ill. 518; *Grinman v. Dean*, 62 Tex. 218; *Hill v. Wand*, 47 Kan. 240; *Sparks v. Texas Loan Agency*, 19 S. W. Rep. 256.

⁶ *White v. Ashton*, 51 N. Y. 280; *Jackson v. Allen*, 120 Mass. 64; *Allen v. Hodge*, 51 Vt. 436; *White v. Water*, 31 Ill. 422-437; *Whitwell v. Winslow*, 134 Mass. 343; *Insurance Co. v. Morey*, 96 U. S. 544; *Birdsey v. Butterfield*, 34 Wis. 52; *McGirr v. Sell*, 60 Ind. 249; *Chatfield v. Simonson*, 92 N. Y. 209; *Phelps v. Railroad Co.*, 94 Ill. 548; *Shields v. Smith*, 37 Ark. 47. "The only case in which a representation as to the future can be held to operate as an estoppel is when it relates to an intended abandonment of an existing right and is made

§ 84. Intention of party estopped.— In order to constitute an estoppel it is necessary that the misrepresentation should have been intended to influence the conduct¹ of some other person; but it is also held that the existence of an actual intention need not be shown, but that an intention may be implied from circumstances which would induce others to act.²

On the other hand, the party pleading the estoppel must have relied upon the misrepresentation or silence of the party estopped, so that he would sustain a loss were the latter to be allowed to disprove the truth of his statement.³

While a fraudulent intent on the part of the person estopped is never absolutely required, it has been repeatedly held that he must know what he says to be false or must have no reasonable grounds for believing his statement to be true.⁴

On the other hand, the party who claims the benefit of the estoppel must prove that he was ignorant of the truth of the statements he relied upon, and that he had no opportunity and

to influence others and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 547-48.

¹ *Harvey v. West*, 87 Ga. 553; *Bishop v. Minton* (N. C., 1893), 17 S. E. Rep. 436; *McCabe v. Raney*, 32 Ind. 309; *Clark v. Culidge*, 8 Kan. 189-195; *Pierce v. Andrews*, 6 Cush. 4; *Wilcox v. Howell*, 44 N. Y. 398; *Turner v. Coffin*, 12 Allen, 401; *Kuhl v. Mayer*, 23 N. J. Eq. 84, 85; *Southard v. Sutton*, 68 Me. 575; *Carroll v. Railroad Co.*, 111 Mass. 1; *Brown v. Bowen*, 30 N. Y. 519; *Holdane v. Colespring*, 21 N. Y. 474.

² *Parlin v. Stone*, 48 Fed. Rep. 808; *Mattes v. Frankel*, 65 Hun, 203; *Stockton Sav. Bank v. Staples* (Cal., 1893), 32 Pac. Rep. 936; *Anderson v. Armstead*, 69 Ill. 452-454; *Horne v. Cole*, 51 N. H. 287; *Ries v. Bruce*, 49 Mo. 231-234; *Bank v. Hazard*, 30

N. Y. 226-230; *Life Ins. Co. v. Norris*, 31 N. J. Eq. 583-585.

³ *Gerlach v. Turner*, 89 Cal. 446; *Draffin v. Railroad Co.*, 34 S. C. 464; *Stevens v. Ludlum*, 46 Minn. 160; *Horne v. Bank*, 108 N. C. 109; *Holman v. Boyce* (Vt., 1893), 26 Atl. Rep. 632; *Vaughn v. Hixon*, 50 Kan. 773; *Hopkins v. McCrillis* (Mass., 1893), 32 N. E. Rep. 1026; *Curnen v. Mayer*, 79 N. Y. 511-514; *Stevens v. Dennett*, 51 N. H. 324-333; *Eaton v. Tel. Co.*, 68 Me. 63; *Graves v. Blandell*, 70 id. 190.

⁴ *In re King*, 29 W. N. C. 426; *Bell v. Goodnature* (Minn., 1892), 52 N. W. Rep. 908; *Raner v. Timerson*, 51 Barb. 517; *Holmes v. Crowell*, 73 N. C. 613; *Whitaker v. Williams*, 20 Conn. 98; *Reed v. McCourt*, 41 N. Y. 435; *Thrall v. Lathrop*, 30 Vt. 307; *Adams v. Brown*, 16 Ohio St. 419; *Smith v. Hutchinson*, 61 Mo. 83; *Lafferty v. Moore*, 33 N. Y. 658; *Wharf v. Prescott*, 7 Allen, 494; *Dorlarque v. Cress*, 71 Ill. 380-382; *Graves v. Blondell*, 70 Me. 90.

was not negligent in inquiring after the knowledge of their truth.¹

§ 85. Admissions and communications sent and received by telephone.—A communication sent or received over a telephone is a message in its legal meaning and relations,² the idea conveyed by the word “telephone” being nearly equivalent to that involved in the word “telegram”—*i. e.*, information received from a distance. The message thus sent may constitute an oral admission under circumstances which are analogous to those rendering admissible a party’s declarations against him. So a conversation had over a telephone with a person who is shown to have such an instrument in his place of residence or business is competent as his admission, and it may be stated by the hearer without the latter identifying the party at the other end of the wire.³ Usually, however, a witness who testifies to an admission or declaration heard over a telephone should identify the party speaking to him.⁴ This he must do *ex necessitate rei* by his recognition of the voice of the speaker, and the admissibility of his testimony will depend on his previous acquaintance, however slight, with the party’s voice.⁵ If he has heard him speak but once before, his evidence of identity will not be thereby rendered incompetent, though his consequent lack of familiarity with the voice may be brought out to affect the value of his evidence of identification.⁶ The identity of the speaker may of course be shown by other competent evidence than that of the witness who heard the statement.⁷ When for any reason direct communication between parties through a telephone is impossible, so that either one with the assent of the other re-

¹ *Martin v. Martin*, 1 Misc. Rep. 181; 33 N. W. Rep. 451; *Wolfe v. Miss. In re Turfler*, id. 58; *Young v. Board of Com’rs of Mahoning*, 51 Fed. Rep. 49; *Miss. Pac. R. Co. v. Heidenheimer*, 585; *Northern Mich. Lumber Co. v. Lyon* (Mich., 1893), 55 N. W. Rep. 438; 245. ⁴ *Stepp v. State*, 20 S. W. Rep. 753; *Tibble v. Anderson*, 63 Ga. 41; *Shaply v. Abbott*, 42 N. Y. 443; *Rosebrough v. Ansley*, 35 Ohio St. 107; *Brightman v. Hix*, 108 Mass. 246. 31 Tex. Cr. Rep. 349.

² *Attorney-General v. Edison Telephone Co.*, 43 L. T. 703, cited in *Anderson’s Law Dict.*, p. 1013.

³ *Reed v. Burlington*, 73 Iowa, 166;

⁵ *Stepp v. State*, 31 Tex. Cr. Rep. 349. ⁶ *People v. Ward*, 3 N. Y. Crim. Rep. 483, 511; *Miss. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

⁷ *Davis v. Walter*, 70 Iowa, 465.

quests an operator at an intermediate station to speak for him, the operator becomes the agent of the speaker;¹ and as each party is usually in turn speaker and receiver, the operator stands in the place of an interpreter, and statements made by him may be regarded as the admissions of either party. Such statements are admissible under the principle which lets in admissions by reference.²

¹Sullivan v. Kuykendall, 83 Ky. 483.

²Oskamp v. Gadsden (Neb.), 52 N. W. Rep. 718. See *ante*, § 77.

CHAPTER VI.

CONFESSIONS.

<p>§ 88. Definition and classification.</p> <p>§8a. To be regarded with caution.</p> <p>89. Voluntary character of confessions.</p> <p>90. Confessions, when voluntary—Inducements offered.</p> <p>91. Confessions need not be spontaneous.</p> <p>92. Preliminary examination.</p>	<p>§ 93. Extra-judicial confessions must be corroborated.</p> <p>94. Conclusive character of judicial confessions.</p> <p>95. Persons offering inducements.</p> <p>96. Confessions of persons other than defendant.</p> <p>97. Confessions of conspirators.</p> <p>98. Confessions of treason.</p>
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§ 88. **Definition and classification.**—Confessions are admissions made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime,¹ and they may be either *judicial* or *extra-judicial*. The former, as the term indicates, are those which are made either at the preliminary examination or at the trial of the accused. The latter are made out of court, and include not only explicit or express verbal or written admissions of guilt, but all admissions from which the guilt of the accused may be inferred.²

Confessions may thus be divided into express confessions and those which are implied from the actions of the accused, such as his resistance or avoidance of arrest,³ his attempts to escape from custody,⁴ and his silence when accused of crime under circumstances where he might be naturally expected to speak.⁵ For silence to be equivalent to confession it must be shown that the accused heard and understood the specific

¹ Stephen's Dig., § 421.

² 1 Greenl. on Evid., § 216.

³ State v. Taylor (Mo., 1893), 22 S. W. Rep. 806; Jamison v. People (Ill., 1893), 34 N. E. Rep. 486; State v. Moncla, 39 La. Ann. 368; People v. Fine, 77 Cal. 147; Carden v. State (Ala., 1888), 4 S. Rep. 823; Com. v. Brigham, 147 Mass. 414.

⁴ Williams v. State, 24 Tex. App. 17, 32; 4 S. W. Rep. 64; People v. Ogle, 104 N. Y. 511; Ryan v. State, 83 Wis. 468; Elmore v. State (Ala., 1893), 13 S. Rep. 427.

⁵ Com. v. Trefethen (Mass., 1893), 31 N. E. Rep. 961; Brown v. State (Tex., 1893), 22 S. W. Rep. 596; State v. Reed, 62 Me. 129.

charge which was made against him,¹ and that he heard it under circumstances calling upon him to deny it.² The prisoner may show that his silence or suspicious actions were caused by threats,³ or that the accusations were made in judicial proceedings;⁴ as, for example, at a coroner's inquest.⁵ A statement implicating the accused, made by some third person to whom he has referred, where the information which was given is responsive to the inquiry made, may be admitted as his confession, if he acquiesces in it.⁶

§ 88a. **To be regarded with caution.**—Writers on evidence have pointed out the necessity for caution in the reception of confessions.⁷ Among the facts which furnish a basis for the employment of a careful scrutiny of this kind of evidence are the peculiar circumstances in which the accused finds himself—that is, embarrassed by a present incarceration and threatened with future imprisonment or death.⁸ The zeal of acute and experienced police officials accustomed to dealing with criminals and apt to regard the accused as guilty until his innocent shall be made to appear may often lead to a wilful or even an unconscious suppression of facts which indicate his innocence, while exaggerating others which point to his guilt.⁹

Numerous cases of false confessions are mentioned in the books which are calculated to incite suspicion that the accused may be endeavoring to secure some object not apparent at first glance. He may be seeking to divert suspicion from some other suspected person, knowing well that on his own trial he will be able to establish his innocence.¹⁰ Such cases are admitted, however, to be exceptional, and, while not without

¹ *Brown v. Com.*, 86 Va. 935; *Sauls v. State* (Tex., 1892), 17 S. W. Rep. 1066; *Robertson v. State*, 17 id. 1068; 30 Tex. App. 496; *Brookser v. State*, 26 Tex. App. 593.

² *Felder v. State*, 5 S. W. Rep. 145; *State v. Carroll*, 30 S. C. 85; *Campbell v. State*, 55 Ala. 80; *Drumright v. State*, 29 Ga. 430; *State v. Smith*, 35 La. Ann. 457; *Kelley v. State*, 55 N. Y. 565. See §§ 78, 79, 82-84.

³ *Golden v. State*, 25 Ga. 527; *State v. Flanagan*, 25 Ark. 92.

⁴ *State v. Mullins*, 101 Mo. 514.

⁵ The fact that the accused had implements in his possession with which to attempt an escape may be shown against him. *State v. Duncan* (Mo., 1893), 22 S. W. Rep. 699.

⁶ *United States v. Gardner*, 42 Fed. Rep. 832. Cf. *People v. Powell*, 87 Cal. 348.

⁷ 1 Greenl. on Evid., § 219.

⁸ *Brister v. State*, 26 Ala. 107.

⁹ See 1 Greenl. on Evid., § 217.

¹⁰ *Wills on Circumstantial Evidence*, p. 88; *Phil. & Am. on Evid.*, 419; *Chitty, Crim. Law*, vol. 1, p. 85.

weight in estimating the true nature of this sort of evidence, they should not be invoked without discrimination to impeach the general character of a confession which was made under conditions which properly render it admissible.¹ So the infirmities incident to all evidence which consists of the reception of language used by others in the presence and hearing of the witness and which have been adverted to in another place² must be taken into consideration.

§ 89. **Voluntary character of confessions.**—Whether a confession is judicial or extra-judicial it must be shown that it was wholly free and voluntary.³ And a proper foundation should first be laid for its reception by asking the witness whether the prisoner had been informed that it would be advantageous for him to confess, or whether any language had been used towards him which, by filling his mind with hope and fear, would render his confession forced or involuntary.⁴ If such a course has been pursued by some third person, the confession will be rejected.⁵ This preliminary question of the voluntary character of the confession bearing upon its admissibility as evidence is a preliminary question for the judge,⁶

¹ A confession is admissible though made to free another from arrest. *People v. Smalling*, 94 Cal. 112.

² See *ante*, §§ 80-82.

³ *Gentry v. State*, 5 S. W. Rep. 660; 24 Tex. App. 80; *Collins v. State*, 24 Tex. App. 141; *Ross v. State*, 67 Md. 286; *People v. Taylor*, 93 Mich. 638; *Com. v. Morey*, 1 Gray (Mass.), 461; *Spears v. Ohio*, 20 Ohio St. 583. This rule does not apply to admissions of collateral facts not involving criminal intent. *State v. Knowles*, 48 Iowa, 593; *People v. Barton*, 49 Cal. 632. *Contra*, *Marshall v. State*, 5 Tex. App. 273; *Quinland v. State*, 16 S. W. Rep. 258; 29 Tex. App. 401. As to the voluntary character of confessions, see *Stafford v. State*, 55 Ga. 592; *State v. Sopher*, 70 Iowa, 494; *Ruberts v. Com.* (Ky.), 7 S. W. Rep. 401; *Alfred v. State*, 37 Miss. 296; *People v. Deacons*, 109 N. Y. 374; *State v. Dildy*, 72 N. C. 325; *State v.*

Chisenhall, 11 S. E. Rep. 518; 106 N. C. 676; *Johnson v. State*, 76 Ga. 76.

⁴ 1 Greenl. on Evid., § 219.

⁵ *People v. Taylor*, 93 Mich. 638; *Cook v. State* (Tex., 1893), 22 S. W. Rep. 23; *State v. Chambers*, 45 La. Ann. 36; *Smith v. State*, 88 Ga. 627; *Craig v. State*, 18 S. W. Rep. 297; *State v. Carson*, 36 S. C. 524; *Green v. State*, 88 Ga. 516; *State v. Carroll*, 30 S. C. 85; *State v. Kinder*, 96 Mo. 548; *People v. Fox*, 3 N. Y. S. 359; *State v. Grant*, 22 Me. 171; *Fife v. Com.*, 29 Pa. St. 329. See *post*, §§ 90, 92.

⁶ *Com. v. Taylor*, 5 Cush. (Mass.) 606; *People v. Fox*, 24 N. E. Rep. 923; aff'g 3 N. Y. S. 359; *Chabbock's Case*, 1 Mass. 144; *Thomas v. State*, 84 Ga. 618; *State v. Holden*, 44 N. W. Rep. 123; 42 Minn. 350; *State v. Harmon* (Del.), 3 Harr. 567; *People v. Sweetland*, 77 Mich. 53; *People v. Howes*, 81 Mich. 396; *People v. Barker*, 60

who should on request examine into the matter out of the presence and hearing of the jury.¹ Where the evidence as to the voluntary character of the confession is conflicting, the question may be left to the jury under judicial instructions that if on all the evidence they find that it was not voluntary they should reject it.²

The burden of proof to show that the accused has been unduly influenced is upon the defense.³ A refusal to allow the counsel for the prisoner to cross-examine the witness upon this point is reversible error.⁴

It is extremely difficult to enunciate any general rule by which may be measured the amount or degree of duress or improper influence which will destroy the voluntary character of the confession. The mere fact that the accused was in charge of an armed police official or a sheriff, or was handcuffed,⁵ or tied,⁶ or in prison,⁷ will not alone render his confession involuntary.⁸ Threats or promises of immunity which would have no effect whatever upon a well-balanced, determined, courageous and experienced man would make a very deep impression on a feeble woman or upon one of weaker intellect or will power, or on a person of immature years and lacking in experience.⁹

id. 277; *Com. v. Morey*, 1 Gray (Mass.), 461; *Biscoe v. State*, 67 Md. 6; *United States v. Nott*, 1 McLean, 499; *State v. Moorman*, 27 S. C. 22; *Murray v. State*, 25 Fla. 528.

¹ *Ellis v. State*, 65 Miss. 44; *Carter v. State*, 37 Tex. 362.

² *Thomas v. State*, 84 Ga. 613; 10 S. E. Rep. 1016; *Carr v. State*, 10 S. E. Rep. 626; 84 Ga. 250; *People v. Howes* (Mich., 1890), 45 N. W. Rep. 961; *Com. v. Piper*, 120 Mass. 185; *People v. Cassidy*, 14 N. Y. S. 349.

³ *Rufer v. State*, 25 Ohio St. 464; *People v. Cassidy*, 133 N. Y. 612; *State v. Howard*, 14 S. E. Rep. 481. *Contra*, *People v. Sweetland*, 77 Mich. 53; 43 N. W. Rep. 779; *Nicholson v. State*, 38 Md. 140; *Barnes v. State*, 36 Tex. 356; *People v. Soto*, 49 Cal. 69; *Johnson v. State*, 30 La. Ann. 881.

⁴ *State v. Miller*, 42 La. Ann. 186. The voluntary character of the statement should be shown before its admission, though if this proof is omitted it may be introduced after the confession is received. *Smith v. State*, 15 S. E. Rep. 675; 88 Ga. 627.

⁵ *State v. Whitfield*, 109 N. C. 876.

⁶ *State v. Rogers* (N. C., 1893), 17 S. E. Rep. 297.

⁷ *People v. Gastro*, 75 Mich. 127; *Com. v. Smith*, 119 Mass. 305; *People v. Rogers*, 18 N. Y. 9; *Cox v. People*, 19 Hun, 340.

⁸ *McQueen v. State*, 10 S. Rep. 433; 94 Ala. 50; *Hornsby v. State*, 10 S. Rep. 522; 94 Ala. 50; *State v. Coella*, 3 Wash. St. 99; *Anderson v. State*, 25 Neb. 550; *State v. Carlisle*, 57 Mo. 102.

⁹ See *Hoover v. State*, 81 Ala. 51; 1 Greenl. on Evid., § 219.

The statement that a confession extorted by threats or promises of immunity is not voluntary, and is inadmissible, is not difficult to understand. The main difficulty lies in the ascertainment of what language used towards the prisoner would constitute a threat or promise.¹ So where defendant voluntarily testified before the grand jury his testimony is admissible against him.² In any event, if it shall appear to the court that the will of the prisoner has been overcome, it matters not whether it be by threats of harm, promises of favor, the fear of detection, or by flattery or trickery, it is the duty of the judge to exclude the confession.³

§ 90. Confessions, when voluntary — Inducements offered. When a prisoner is first cautioned that what he is about to say will be taken down and may be used against him his confession is not thereby rendered involuntary.⁴ On the other

¹ Thompson's Case, 1 Leach, 325; Cass' Case, id. 328; Com. v. Harman, 4 Barr, 269; Boyd v. State, 2 Humph. 37; Dillon's Case, 4 Dall. 116; Reg. v. Garner, 12 Jur. 944; Canada v. State (Tex., 1890), 16 S. W. Rep. 341. The testimony of the accused voluntarily given as a witness in a prior trial of another person for the crime with which the witness is now charged may be used against him. See *post*, §§ 320, 321; Burnett v. State, 87 Ga. 622; People v. Mitchell, 94 Cal. 550; People v. Gallagher, 75 Mich. 512; State v. Glahn, 97 Mo. 579.

² State v. Carroll, 51 N. W. Rep. 1159; State v. Coffee, 56 Conn. 399.

³ Regina v. Baldy, 16 Jur. 599; Bubster v. State, 33 Neb. 663; 50 N. W. Rep. 953; Lauderdale v. State (Tex., 1892), 19 S. W. Rep. 679; Rex v. Kingston, 4 C. & P. 387; Reg. v. Jarvis, L. R. 1 Q. C. R. (C. B.) 96; McClain v. Com., 110 Pa. St. 269. A promise that the accused will be used as a witness for the state (State v. Johnson, 30 La. Ann. 881), or that he will be helped if he confesses (State v. Von Sachs, 30 La. Ann. 942),

or a declaration that a suspected person had better pay for what he had taken (Cook v. State (Tex., 1893), 22 S. W. Rep. 23), that he might as well own up, coupled with an accusation of theft (Smith v. State, 88 Ga. 627), a promise to get the accused out of the trouble (Searcy v. State, 28 Tex. App. 513; Clayton v. State, 31 Tex. Crim. App. 489), or a threat to kill (Bush v. Com. (Ky., 1892), 17 S. W. Rep. 330), advice that to own up will save defendant from a heavy sentence (Searles v. State, 6 Ohio Cir. Ct. 331), that he ought to be hung (State v. Carson, 36 S. C. 524), a promise by the district attorney that he will not be prosecuted (Neely v. State, 27 Tex. App. 324), to tell the truth and have no more trouble (Biscoe v. State, 67 Md. 6),—have all been held enough to render a confession inadmissible because involuntary.

⁴ Reg. v. Holmes, 1 C. & K. 248; Reg. v. Atwood, 5 Cox C. C. 322; Rizzolo v. Com., 126 Pa. St. 54; United States v. Kirkwood, 5 Utah, 123; Maples v. State, 3 Heisk. 408; Rex v. Baldry, 2 Den. C. C. 430. See *post*, § 92.

hand, while such a warning is advisable on grounds of humanity and justice, it is not, in the absence of statute, an absolute prerequisite to be complied with before the confession will be valid.¹

If the accused, on being apprehended, has been threatened or promised immunity in order to obtain a confession, and if subsequently, when these means are found ineffectual, the promise or threat has been withdrawn so that he is no longer influenced, his confession then made will be deemed to be free and voluntary.² Even if a confession is involuntary, no valid reason exists why another later and wholly distinct, voluntarily made to the same or to another person after the undue influence has ceased, should not be received. It has accordingly been held that where it is shown that the hopes or fears which were attendant upon the former confession no longer obtain, the later confession is admissible.³

§ 91. Confession need not be spontaneous.—It is not necessary for a confession to be the spontaneous utterance of the accused.⁴ It will be received though it may have been obtained solely by persistent questions put to him by officials

¹ *Woolfolk v. State*, 85 Ga. 69; *Regina v. Arnold*, 8 C. & P. 622; *Kirby v. State*, 5 S. W. R. 165; 23 Tex. App. 13. Where by statute such a caution is required, a confession of one crime, made while defendant was in custody charged with another, is inadmissible on his trial for the former offense. *Niederluck v. State*, 21 Tex. App. 320.

² *Rex v. Clewes*, 4 C. & P. 221; *McAdory v. State*, 62 Ala. 154; *State v. Chambers*, 39 Iowa, 179; *Reg. v. Bate*, 11 Cox C. C. 686; *Walker v. State*, 7 Tex. App. 245; *State v. Jones*, 54 Mo. 478.

³ 1 Greenl. on Evid., § 221, citing *Guild Case*, 5 Halst. 180; *Roberts' Case*, 1 Dev. 259, 264; *Com. v. Harman*, 4 Barr, 269. The improper influence under which the prior confession is made is presumed to continue until the contrary is shown (*United States v. Chapman*, 4 Am.

Law Jour. 440; *Murray v. State*, 6 S. Rep. 498; *Coffee v. State* (Ala., 1891), 6 S. Rep. 493. See, also, *post*, § 321; and the evidence which will rebut the presumption of a continuance of the influence must be clear and satisfactory. *Porter v. State*, 55 Ala. 95; *Com. v. Cullen*, 111 Mass. 435; *State v. Jones*, 54 Mo. 478; *State v. Lawhorne*, 66 N. C. 638; *Berry v. United States*, 2 Colo. Terr. 186; *Walker v. State*, 7 Tex. App. 245; *Kollenberger v. People*, 9 Colo. 233; *People v. Johnson*, 41 Cal. 452. It is for the judge to say whether the presumption has been rebutted (*Porter v. State*, *supra*); and it has been held that the fact that the prisoner was cautioned that he need not speak is sufficient to rebut the presumption. *Com. v. Ackert*, 133 Mass. 402; *Reg. v. Bate*, 11 Cox C. C. 686.

⁴ 1 Greenl. on Evid., § 229.

or private persons, even where the questions by their form presuppose his guilt,¹ if in putting such assuming questions no unfair advantage amounting to duress is gained over him.² In the absence of statutes rendering such communications privileged, statements made to a spiritual adviser are admissible against the prisoner.³

A voluntary confession is not inadmissible because made under a sworn promise of secrecy,⁴ or procured by the promise of some benefit having no connection with the crime confessed,⁵ as, for example, by a promise that the prisoner may see visitors or have his shackles removed,⁶ or be released from a rigorous confinement.⁷ So it has been held that a voluntary confession is not to be rejected because it was obtained by means of deception or artifice practiced on the prisoner if the inducement employed did not cause him to make an untrue statement.⁸ Thus, confessions procured by reason of the accused having been made drunken have been received.⁹ The authorities, however, are not harmonious, and in more recent cases it has been decided that confessions obtained by a person who, falsely representing himself to be an attorney at law, obtained the confidence of the prisoner,¹⁰ or by an officer who procured the intoxication of the prisoner,¹¹ are not ad-

¹ *Rex v. Wild*, 1 Mood. Cr. Cas. 452.

² *McClain v. Com.*, 110 Pa. St. 239.

A voluntary confession, otherwise admissible, will not be rejected because when made the accused was unlawfully imprisoned. *Balbo v. People*, 19 Hun (N. Y.), 424.

³ *Rex v. Wild*, 1 Mood. Cr. Cas. 452; *Rex v. Court*, 7 C. & P. 486. See *post*, § 177.

⁴ *State v. Darnell*, 1 Houst. C. C. (Del.) 321; *Com. v. Knapp*, 9 Pick. 496.

⁵ *State v. Wentworth*, 37 N. H. 196; *Rex v. Green*, 6 C. & R. 655.

⁶ *Rex v. Lloyd*, 6 C. & P. 393.

⁷ *State v. Tatro*, 50 Vt. 483.

⁸ 1 Greenl. on Evid., § 229; *Rex v. Derrington*, 2 C. & P. 418.

⁹ *Lester v. State*, 32 Ark. 727; *Eskridge v. State*, 25 Ala. 30; *Jefferds v.*

People, 5 Park. C. R. 547; *Com. v. Howe*, 9 Gray, 110; *State v. Feltes*, 51 Iowa, 495; *Territory v. McKern* (Idaho, 1890), 26 Pac. Rep. 123. See *post*, § 127. And a voluntary confession made to a detective who is locked up with the prisoner for that purpose, or who in the guise of a friend obtains the confession, is admissible despite the deception employed. *State v. Brooks* (Mo., 1887), 5 S. W. Rep. 257; *Heidt v. State* (Neb., 1887), 30 N. W. Rep. 626; *Osborn v. Com.* (Ky., 1893), 20 S. W. Rep. 223. Cf. *Stafford v. State*, 55 Ga. 392. See *post*, § 127.

¹⁰ *People v. Stewart*, 75 Mich. 21; *Cotton v. State*, 87 Ala. 875.

¹¹ *McCabe v. Com.* (Pa., 1887), 8 Atl. Rep. 45.

missible. But any person who overhears the remarks of the prisoner made to himself or to a person such as an attorney or spiritual adviser who is incompetent as a witness may testify to what he has heard.¹ So a confession constituting a part of a prayer may be testified to by one who has overheard it, though he may not have heard the whole prayer;² and a confession made to a fellow-prisoner in the erroneous belief that one criminal could not testify against another is not inadmissible.³

§ 92. Preliminary examination.—The main objects of the preliminary examination of an accused person are to perpetuate the testimony⁴ and to ascertain whether the accused should be admitted to bail, and the prisoner can only be questioned upon the charge against him after all the evidence incriminating him has been received. Not only must he be free at the examination from the influences of hope or fear, but he must realize that he is so. Hence he must not be sworn; and if by mistake his statement is taken under oath, it will be inadmissible upon the ground that its free and voluntary character has been destroyed by adding to the existing embarrassment of his condition the apprehension of a possible punishment for perjury.⁵ But the fact that a person who voluntarily appears before a magistrate and confesses is sworn does not render his confession inadmissible.⁶ The signature of the accused, unless required by statute to his statements, which have been committed to writing, is not indispensable; but as it

¹ *Rex v. Simmons*, 6 C. & P. 540, and cases in last note.

² *Woolfolk v. State*, 85 Ga. 69.

³ *State v. Mitchell*, Phill. (N. C.) L. 447.

⁴ So it is frequently provided by statute that the evidence of witnesses on the preliminary examination, when committed to writing, shall be admissible on the subsequent trial of the accused in case they shall be dead, absent from the state or otherwise unable to testify. *McCollum v. State*, 14 S. W. Rep. 1020; 29 Tex. App. 162; *Potts v. State*, 26 Tex. App. 663; 14 S. W. Rep. 446; *People v. Nelson*, 85

Cal. 421; 24 Pac. Rep. 1006; *Miller v. State*, 62 Miss. 221; 8 S. Rep. 273; *State v. Riley*, 8 S. Rep. 469; 42 La. Ann. 995; *State v. Jackson*, 9 Mont. 458.

⁵ 1 Greenl. on Evid., § 225; *Salas v. State*, 31 Tex. Crim. R. 485; *People v. Gibbons*, 43 Cal. 557; *Com. v. Brown*, 150 Mass. 330; *State v. Garvey*, 25 La. Ann. 191; *Hendrickson v. People*, 10 N. Y. 13. Cf. *People v. Kelley*, 47 Cal. 125; *Rex v. Lewis*, 6 C. & P. 161; *Reg. v. Owen*, 9 id. 238.

⁶ *People v. McGloin*, 91 N. Y. 241; *Com. v. Clark*, 130 Pa. St. 650; 18 Atl. Rep. 988.

is of use as a means of identification, it should be procured when possible. If he signs it he makes its language his own and waives all objection to its reception as evidence;¹ and this is so though the writing is in a language not understood by the accused, provided its contents have been translated to him.²

The necessity that the accused should be examined without being sworn is well illustrated where the prisoner has been a witness at a coroner's inquest into the crime of which he stands charged. If the prisoner was a witness at the coroner's inquest, and if at that time he was not under arrest and not charged with the crime, his sworn testimony as a witness may be used against him upon his trial for the same offense, even though at the date of giving his testimony at the inquest he may have been strongly suspected of committing the crime.³ On the contrary, where he is under arrest when he testifies at the inquest, he stands in the position of one accused of crime and cannot be compelled to testify against himself, and is entitled to the same rights and warning, so far as his sworn statement is concerned, as is a prisoner on a preliminary examination.⁴

The examination to be admissible must be identified. If the accused has signed with his mark alone, or if his signature has not been obtained, it must be shown by parol that the statement was read to him and that he assented thereto or acquiesced in it.⁵ One of the principal purposes of the preliminary examination being to preserve the evidence against the prisoner, the minutes of the examination and the statements of the witnesses and of the prisoner, when committed to writing, are usually signed by the magistrate and transmitted to the

¹ Com. v. Coy (Mass., 1893), 32 N. E. Rep. 4.

² State v. Demarest, 41 La. Ann. 617.

³ State v. Senn (S. C., 1890), 11 S. E. Rep. 292.

⁴ Hendrickson v. People, 10 N. Y. 13; Teachout v. People, 41 N. Y. 8; People v. Mondon, 103 N. Y. 214. See *post*, § 345a. But where he appears voluntarily and is properly cautioned (State v. Leuth, 5 Ohio Cir. Ct. R. 94; State v. Mullins, 101 Mo.

514. Cf. State v. Gilman, 51 Me. 306; Kirby v. State, 23 Tex. App. 13; Lovett v. State, 60 Ga. 257; State v. Young, 1 Winst. (N. C.) L., No. 1, 126; State v. Zellers, 7 N. J. L. 220; Snyder v. State, 59 Ind. 109), his statement is admissible against him.

⁵ Harris v. State, 6 Tex. App. 97; State v. Mullins, 101 Mo. 514. Cf. Steagels v. State, 23 Tex. App. 464; State v. Miller, 35 Kan. 328; State v. Dufour, 31 La. Ann. 804.

district attorney or other officials charged with the duty of prosecuting offenders. In accordance with the presumption that an official has properly performed his duty,¹ the statement as thus written is conclusive of the fact that everything material that was said or done has been accurately stated, and parol evidence is not admissible to show the contrary.²

When the examination has not been committed to writing, or if the written examination is inadmissible because of a lack of jurisdiction apparent on its face, or for any other substantial reason, parol evidence of what the prisoner voluntarily stated upon his examination will be received.³ So parol evidence of a confession made extra-judicially is never rendered inadmissible by the fact that on his judicial examination or by the prisoner himself his confession has been taken down in writing.⁴ The fact that the prisoner desires to waive the preliminary examination will not, if he has been properly cautioned, render his statements inadmissible.⁵

§ 93. Extra-judicial confessions must be corroborated.—A naked confession is one uncorroborated by independent proof of the *corpus delicti*;⁶ and the rule is that while a conviction may be had upon such a confession if judicial, as, for example, by a plea of guilty in open court, yet in the case of extra-judicial confessions the *corpus delicti* must be proved by evidence *aliunde* before a conviction will be warranted.⁷

¹ See *post*, § 231.

² *People v. Hinchman*, 75 Mich. 587; *Rex v. Weller*, 2 Car. & K. 223; *Hill v. State*, 64 Miss. 431; 1 S. Rep. 494; 1 Greenl. on Evid., § 230. See *post*, § 205 et seq.

³ *Jeans v. Wheedon*, 2 M. & Rob. 484; *State v. Vincent*, 1 Houst. (Del.) 11; *State v. Parrish*, Busb. Law, 239. Parol evidence of the prisoner's statement while undergoing examination is not admissible if the magistrate returns that the prisoner refused to speak. *Rex v. Walter*, 7 C. & P. 267.

⁴ *State v. Head* (S. C., 1893), 16 S. E. Rep. 892; *Rowland v. Ashby*, Ry. & M. 231; *Roscoe*, Crim. Evid., 45; *Rex v. Spilsbury*, 7 C. & P. 188; *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94.

⁵ *Shaw v. State* (Tex., 1893), 22 S. W. Rep. 588.

⁶ 1 Greenl. on Evid., § 217.

⁷ *Martin v. State* (Ala., 1890), 8 S. Rep. 858 (confession of child under fourteen); *Mullins v. Com.* (Ky., 1892), 20 S. W. Rep. 1035; *Westbrook v. State* (Ga., 1893), 16 S. E. Rep. 100; *United States v. Boese*, 46 Fed. Rep. 917; *Wigginton v. Com.*, 17 S. W. Rep. 634; *Willard v. State*, 27 Tex. App. 386; *Patterson v. Com.*, 86 Ky. 313; *Johnson v. State*, 59 Ala. 37; *Priest v. State*, 10 Neb. 393; *People v. Hennessy*, 15 Wend. 147; *State v. Keeler*, 28 Iowa, 551; *Osborn v. Com.* (Ky., 1893), 20 S. W. Rep. 223; *Bergen v. People*, 17 Ill. 426; *Ruloff v. People*, 18 N. Y. 179. Cf. *Com. v.*

In testifying to extra-judicial confessions it is absolutely essential that the language of the accused should be given in its entirety.¹ To permit the introduction of fragmentary remarks, admitting those which indicate the prisoner's guilt and suppressing others which by limiting or modifying the former may establish his innocence, is inconsistent with principles of justice and humanity. The whole of what the prisoner said to the witness must be put in evidence and its sufficiency and weight are for the jury, the prosecuting official being permitted to contradict or impeach that portion which may be favorable to the accused,² and the confession, so far as it is either favorable or against the prisoner, may be altogether rejected by the jury in case it is not believed by them.³

If a confession is complete as to incriminating facts it will not be excluded because the accused was interrupted and prevented from stating exculpatory facts.⁴ The credit to be given to the confession depends wholly upon the circumstances of each case.⁵ A witness will not be permitted to testify that the prisoner confessed to him that he had committed a crime which has no connection with the offense for which he is on trial.⁶

§ 94. **Conclusive character of judicial confessions.**—The guilt of the accused may or may not be inferred by the jury from evidence that the accused made an extra-judicial confes-

Sanborn, 116 Mass. 61; *Brown v. State*, 32 Miss. 433; *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94. Where the *corpus delicti* on an indictment for passing counterfeit money is shown by proof that the counterfeit was passed as genuine, the confession of the accused that he passed the note is corroborated. *United States v. Marcus*, 53 Fed. Rep. 784.

¹ *Berry v. Com.*, 10 Bush (Ky.), 15; *Cable v. Com.* (Ky., 1893), 20 S. W. Rep. 220; *Pace v. Com.* (Tex., 1893), 20 S. W. Rep. 762; *Com. v. Goddard*, 80 Mass. 402; *Real v. People*, 42 N. Y. 270; *State v. Mack*, 48 Wis. 271.

² *Taylor v. Com.*, 18 Atl. Rep. 588; *People v. Irwin*, 77 Cal. 494; *Dodson*

v. State, 86 Ala. 60; *State v. Feltes*, 51 Iowa, 495. See *ante*, § 80.

³ *State v. Mahan*, 32 Vt. 241; *People v. Taylor*, 93 Mich. 638; *Respublica v. McCarthy*, 2 Dall. 86, 88; *People v. Cassidy*, 133 N. Y. 612; *Com. v. Brown*, 149 Mass. 35; *Long v. State*, 86 Ala. 36; *State v. West*, 1 Houst. (Del.) 371; *Griswold v. State*, 24 Wis. 144; *Furst v. State*, 47 N. W. Rep. 1116; 31 Neb. 403; *Johnson v. State*, 86 Ga. 90. See, also, as to admissions, § 81.

⁴ *Levison v. State*, 54 Ala. 520.

⁵ *Coon v. State*, 13 Sm. & M. 246.

⁶ *Com. v. Campbell*, 155 Mass. 537; 30 N. E. Rep. 72; *Youree v. Territory* (Ariz., 1892), 29 Pac. Rep. 894; *Reg. v. Butler*, 2 Car. & Kir. 221. *Contra*, *State v. Underwood*, 75 Mo. 230.

sion, according as they believe it is corroborated as to the *corpus delicti*. But a judicial confession voluntarily made in the hearing of the jury by the prisoner is, if he is of sound mind, conclusive on them. On such a confession, furnishing direct and original evidence of guilt, the prisoner may be convicted and sentenced to death or a term of imprisonment.¹ When, however, the confession of the accused is elicited in the preliminary examination under the statutes 1 and 2 P. & M., ch. 13; 7 Geo. 4, ch. 64, and similar statutory provisions existing in the United States, the confession of the prisoner committed to writing must be submitted with other evidence to the trial jury to be weighed by them.²

§ 95. Persens offering inducements.—A conclusive presumption that a confession is involuntary is created by the circumstance that the person who has induced the accused to confess by employing threats or promises was so related to him that he could exercise authority or power over him.³ Thus, where the inducements proceed from the prosecuting witness,⁴ from the district attorney,⁵ from members of the coroner's jury,⁶ from a police official or jailor in whose custody the accused is,⁷ or from a magistrate,⁸ the confession will be rejected.⁹

Whether a confession procured by a threat or promise by one having no power over the prisoner, and consequently unable to fulfill the threat or promise, creates a conclusive presumption of the existence of duress, the authorities are divided.¹⁰ So it has been held that a threat made by any one would create a conclusive presumption that the confession was not free

¹ Com. v. Brown, 150 Mass. 330.

⁶ State v. Carson, 15 S. E. Rep. 588.

² A confession made before a coroner is not a judicial confession which will dispense with corroboration. State v. Leuth, 5 Ohio Cir. Ct. Rep. 94.

⁷ Clayton v. State, 31 Tex. Crim. R. 489; Com. v. Russell, 156 Mass. 196; 30 N. E. Rep. 763; People v. Thomson, 84 Cal. 598 (sheriff); Com. v. Mosler, 4 Barr, 264.

³ 1 Greenl. on Evid., § 222. See ante, § 89.

⁸ Guild's Case, 5 Halst. 163.

⁴ Roberts' Case, 1 Dev. 259; Com. v. Sego, 105 Mass. 210; Thompson's Cases, 1 Leach C. C. 325.

⁹ Neeley v. State, 27 Tex. App. 324; State v. Didy, 72 N. C. 325; State v. Crowson, 98 id. 595.

⁵ Searles v. State, 6 Ohio Cir. Ct. 331.

¹⁰ Parke, B., in Rex v. Spencer, 7 C. & P. 776.

and voluntary.¹ The contrary doctrine is maintained in some of the cases,² which support the proposition that a threat or a promise must be made by one actually in authority.

Upon general principles, the distinction made where threats are made by private persons would seem without foundation, inasmuch as the question, was the will of accused actually subjugated, is one of fact, to be decided on all the circumstances of each particular case.³ But the fact that the person using threats did not possess the means of carrying them into execution would doubtless, if known to the prisoner, detract from or wholly nullify the effect calculated to be produced upon his mind.⁴

§ 96. Confessions of persons other than defendant.—The incriminating declarations of third persons that they committed the crime with which the prisoner is charged are merely hearsay unless such persons are produced as witnesses.⁵ But where the prosecution alleges that the third person was an accomplice, his confession that he was the principal is admissible upon the trial of the latter.⁶

§ 97. Confessions of conspirators.—The same principle that obtains in cases of joint civil liability is applicable where two or more persons are jointly indicted for the same crime.⁷ The existence of the conspiracy or combination being satisfactorily established,⁸ the confession or incriminating declarations or acts of any member made in the prosecution of the enterprise are admissible against all. When, however, the common undertaking is consummated or abandoned, the com-

¹ *Rex v. Dunn*, 4 C. & P. 543; *Rex v. Slaughter*, 8 id. 734; *Guild's Case*, 5 Halst. 163; *Knapp Case*, 9 Pick. 496, 500, cited in 1 Greenl. on Evid., § 223.

² *Early v. Com.*, 86 Va. 921; *Rex v. Hardwick*, 6 Pet. Abr. 84; *Rex v. Moore*, 2 Den. C. C. 522; *Reg. v. Reeve*, 12 Cox C. C. 179.

³ *McAdory v. State*, 62 Ala. 154; *Com. v. Tuckerman*, 10 Gray, 190; *Com. v. Howe*, 2 Allen (Mass.), 153; *Newman v. State*, 49 Ala. 9; *Johnson v. State*, 61 Ga. 305; *State v. Darnell*, 1 Houst. (Del.) 321; *Flagg v. People*, 40 Mich. 706; *State v. Phelps*, 11 Vt. 114.

⁴ *Com. v. Gorey*, 1 Gray (Mass.), 463.

⁵ *Welsh v. State* (Ala., 1893), 11 S. Rep. 450; *State v. West*, 45 La. Ann. 14; 13 S. Rep. 173; *State v. Duncan* (Mo., 1893), 22 S. W. Rep. 699; *State v. Fletcher* (Oreg., 1893), 33 Pac. Rep. 575; *Owensby v. State*, 82 Ala. 63; 2 S. Rep. 764; *State v. Duncan*, 6 Ired. L. (N. C.) 236; *State v. Haynes*, 71 N. C. 79.

⁶ *Pace v. State* (Tex., 1893), 20 S. W. Rep. 762. See as to testimony of accomplices, §§ 320, 321.

⁷ See *ante*, § 69.

⁸ *McGraw v. Com.* (Ky., 1893), 20 S. W. Rep. 879.

munity of interest no longer exists. The confession of any participant in the criminal design is then only receivable against himself.¹ In other words, the confession of an accomplice or participant in a criminal act is only receivable against his associates when it can be connected with and is relevant to acts for which the latter are responsible.²

Where persons other than the defendant are mentioned in a confession, and it is not alleged in the indictment that they are implicated in the crime, the confession is admissible and the court must instruct the jury to disregard this fact.³

§ 98. Confessions of treason.—In consequence of the statutory requirement that to convict a prisoner of the crime of treason the testimony of two witnesses to an overt act was required, it was at one time doubted whether an extra-judicial confession of treason was admissible against one charged with that crime.⁴ It is now the law that while no one can be convicted of the crime solely upon a confession which does not assume the form of a plea of guilty in open court, yet any confession, made extra-judicially, is admissible against him, its weight and credibility being for the jury. It must, however, be proved by two witnesses to be admissible.⁵

¹ *Pace v. State* (Tex., 1893), 20 S. W. Rep. 762; *Ryan v. State*, 83 Wis. 486; *State v. Grant* (Iowa, 1893), 53 N. W. Rep. 120; *Wilbur v. Strickland*, 1 Rawle, 458; *United States v. Gibert*, 2 Sumn. 16; *State v. Donelon* (La., 1893), 12 S. Rep. 922; *Cable v. Com.*, 20 S. W. Rep. 220; *Searles v. State*, 6 Ohio Cir. Ct. R. 331; *Beicher v. State*, 125 Ind. 419; *State v. McKenzie*, 102 Mo. 620; *McGraw v. State*, 20 S. W. Rep. 279; *People v. Collins*, 64 Cal. 293; *United States v. Gooding*, 12 Wheat. 469; *Amer. Fur Co. v. United States*, 2 Pet. 358; *Corbett v. State*, 5 Ohio Cir. Ct. 155. The confession or incriminating act may be given in evidence prior to proof of the conspiracy on the promise of the prosecutor to establish a *prima facie* conspiracy later. *Hall v. State* (Fla., 1893), 12 S. Rep. 449; *State v. Grant* (Iowa, 1893), 53 N. W. Rep. 120; *State v. McGee*, 46 N. W. Rep. 764.

² *Priest v. State*, 10 Neb. 393; *State v. Mims* (S. C., 1893), 17 S. E. Rep. 850; *State v. Weasel*, 30 La. Ann. 919; *Crosby v. People*, 27 N. E. Rep. 49; *Gove v. State*, 58 Ala. 391; *Spencer v. State*, 31 Tex. 64; *State v. Tibeau*, 30 Vt. 100; *Ake v. State*, 31 Tex. 476; *Com. v. Thompson*, 99 Mass. 444. The silence or failure to explain of one jointly indicted with others where statements incriminating him are made by one of his associates does not, it is held, raise a presumption against him. *Com. v. McDermott*, 123 Mass. 441.

³ *Rex v. Hearne*, 4 C. & P. 215; *State v. Carr*, 53 Vt. 37, 41.

⁴ 1 East P. C. 131-133. See *post*, § 380.

⁵ *Francis' Case*, 1 East P. C. 133-135; 1 Burr's Trial, 196, cited in 1 Greenl. on Evid., § 235.

CHAPTER VII.

DYING DECLARATIONS.

§ 100. Definition.

101. Sense of approaching death.

§ 102. In what cases admissible.

103. Form of the declaration.

§ 100. **Definition.**—Another class of exceptions to the rule rejecting hearsay comprises dying declarations. These declarations may be defined as statements or declarations of some material fact concerning a homicide, made by a person who is the victim and who fully realizes that he is in imminent danger of death, and that in a very short time.¹ The fact that the speaker believes he is at the point of death, and that in all probability in a very short time all that is spiritual and immortal will forever forsake the body, and will encounter the dread possibilities of the unknown and supernatural world, is deemed to furnish a sanction equivalent to that of a solemn and positive oath administered in court.² If, therefore, the deceased was totally irreligious, so that he had no belief in a state of future reward or punishment, this fact alone, while not rendering his statement inadmissible, is competent to go to the jury as affecting the credit to be given it.³

On the other hand, the fear of punishment for perjury, so far as it can be administered in this world, is wholly absent, and unless the dying man possesses and is controlled by a vivid and conscientious feeling of accountability to the Judge of all men in whose presence he expects soon to appear, it is probable that his utterances may be materially influenced and biased against the accused by the passions of revenge and anger. But the fact that the declarant believed, as a matter of religious opinion, that he may repent of any sin at any

¹ See 1 Greenl. on Evid., § 156; Goodall v. State, 1 Oreg. 333; State v. Elliott, 45 Iowa, 386; State v. Ah

² Rex v. Woodcock, 2 Leach Cr. Cas. 567. Lee, 8 Oreg. 214. See *post*, § 313, as to the requirements of religious be-

³ Hill v. State, 64 Miss. 431; 1 S. Rep. 494; People v. Chin, 51 Cal. 597;

moment before death, will not render his declaration inadmissible.¹

§ 101. Sense of approaching death.—The deceased person when he made the declaration must have been conscious of the near approach of death, and must believe that there is absolutely no hope of his recovery.² The mental condition of the declarant in this respect must therefore be shown before his declaration is received, and if he entertains any hopes, however slight, that his injury is not mortal, his statement will be rejected.³

The statement of the dying person himself that he is dying should always be received,⁴ as it is the most satisfactory and convincing evidence; but upon this important point no form of words is necessary, nor is it the only evidence. So his resignation to approaching death or his belief that he may recover may be shown by independent evidence and may be proven by the statements of those attending him or inferred from the circumstances of the case.⁵ Thus, where the de-

¹ *North v. People*, 28 N. E. Rep. 966; 139 Ill. 81.

² *Whitaker v. State*, 79 Ga. 87; 3 S. E. Rep. 403; *State v. Johnson*, 34 N. W. Rep. 177; 72 Iowa, 396; *Stephenson v. State*, 110 Ind. 358; *State v. Mathes*, 90 Mo. 571; *Darbey v. State*, 23 Tex. App. 407; *Irby v. State*, 23 id. 103; *Peak v. State*, 50 N. J. L. 179; 12 Atl. Rep. 701; *Walton v. State*, 79 Ga. 46; 5 S. E. Rep. 205; *Vaughn v. Com.*, 86 Ky. 431; 6 S. W. Rep. 153; *State v. Murdy*, 81 Iowa, 603; *People v. Bemmerly*, 87 Cal. 117; 25 Pac. Rep. 266; *Snell v. State*, 29 Tex. App. 236; *State v. Turlington*, 102 Mo. 642; *Hammill v. State*, 90 Ala. 577; *United States v. Heath*, 19 Wash. Law R. 818; *Hall v. Com.* (Va., 1892), 15 S. E. Rep. 517; *Young v. State* (Ala., 1892), 10 S. Rep. 913; *State v. Bannister*, 35 S. C. 290; 14 S. E. Rep. 678; *McQueen v. State*, 94 Ala. 50; 10 S. Rep. 433; *Archibald v. State*, 122 Ind. 122; *Scott v. People*, 63 Ill. 508; *Kehoe v. Com.*, 80 Pa. St.

127; *Com. v. Black*, 108 Mass. 296; *State v. Blackburn*, 80 N. C. 474; *State v. Daniel*, 31 La. Ann. 91; *Com. v. Thompson* (Mass., 1893), 33 N. E. Rep. 1111; *State v. Spencer*, 30 La. Ann. 362; *State v. Schmidt*, 73 Iowa, 469; *Powers v. State*, 87 Ind. 144.

³ See cases in last note. If the declarant is conscious of approaching death, it is not material that no one told him that he was about to die. *Hammel v. State*, 90 Ala. 577.

⁴ *Com. v. Thompson* (Mass., 1893), 33 N. E. Rep. 1111.

⁵ *People v. Bemmerly*, 25 Pac. Rep. 266; 87 Cal. 117; *People v. Samario*, 84 Cal. 484; *Fulcher v. State*, 13 S. W. Rep. 750; 28 Tex. App. 465; *Pulliam v. State*, 6 S. Rep. 839; 88 Ala. 1; *Archibald v. State*, 122 Ind. 122; *People v. Smith*, 104 N. Y. 491; *People v. Ramirez*, 73 Cal. 403; *State v. Newhouse*, 38 La. Ann. 862; 2 S. Rep. 799; *Ledbetter v. State*, 23 Tex. App. 247; *State v. Schmidt*, 73 Iowa, 469; 35 N. W. Rep. 590; *People v. Farmer*,

ceased states that he was sure to die;¹ that he never expected to recover from his wound;² that he knew he could not live;³ that he was killed,⁴ or makes use of similar expressions, it is conclusively presumed that he spoke under a full sense of approaching death. But where the declarant merely states that he has "no hope at present,"⁵ or says "Who knows? perhaps I may get well,"⁶ or expresses a hope if he dies to meet one in heaven,⁷ his declaration not being made in apprehension of approaching death, is inadmissible.⁸

Though the dying statement was made while the deceased was still hopeful of recovery, yet it is receivable if he subsequently ratifies it when all hope has departed.⁹ So, on the other hand, the fact that the dying man is afterwards encouraged to believe that he will recover will not render inadmissible his statement previously made in immediate expectation of death.¹⁰ But the fact that death does not immediately ensue.

18 Pac. Rep. 800; *State v. Block*, 42 La. Ann. 861; *United States v. Heath*, 20 D. C. 272; *Jordan v. State*, 81 Ala. 20; *Dixon v. State*, 13 Fla. 636; *Dumas v. State*, 62 Ga. 58; *State v. Wilson*, 24 Kan. 189; *People v. Com.*, 87 Ky. 487; 9 S. W. Rep. 509; *Mockabee v. Com.*, 78 Ky. 380; *State v. Mills*, 91 N. C. 581; *Railing v. Com.*, 113 Pa. St. 37.

¹*State v. Umble* (Mo., 1893), 22 S. W. Rep. 378; *Crump v. Com.* (Ky., 1893), 20 id. 390; *State v. Aldrich*, 50 Kan. 666; *Wallace v. State* (Ga., 1893), 15 S. E. Rep. 700; *Evans v. State* (Ark., 1893), 22 S. W. Rep. 1026; *State v. Fletcher* (Oreg., 1893), 33 Pac. Rep. 575; *State v. Turlington*, 102 Mo. 642; *Pulliam v. State*, 88 Ala. 1.

²*State v. Nance*, 25 S. C. 168.

³*People v. Callaghan*, 4 Utah, 49.

⁴*State v. Russell*, 32 Pac. Rep. 854; *State v. Elkins*, 101 Mo. 344; 14 S. W. Rep. 116; *Luker v. Com.* (Ky., 1887), 5 S. W. Rep. 354.

⁵*Rex v. Jenkins*, L. R. 1 Cr. Cas. 187.

⁶*Jackson v. Com.*, 19 Gratt. 656.

⁷*State v. Medlicott*, 9 Kan. 257.

⁸*Graves v. People* (Colo., 1893), 32 Pac. Rep. 63.

⁹*Reg. v. Steele*, 12 Cox C. C. 168.

¹⁰*State v. Shafer* (Oreg., 1893), 32 Pac. Rep. 545; *State v. Tilghman*, 11 Ired. (N. C.) Law, 573; *State v. Turlington*, 102 Mo. 642; *Lursher v. Com.*, 26 Gratt. 963. *Cf. Ex parte Nettles*, 58 Ala. 268. It is for the court to determine whether the sense of approaching death was present (*Roten v. State* (Fla., 1893), 12 S. Rep. 890); and the burden of proof is upon the prosecution. *Peak v. State*, 50 N. J. L. 222; *Digby v. People*, 113 Ill. 125; *Wallace v. State* (Ga., 1893), 15 S. E. Rep. 710; *Evans v. State* (Ark., 1893), 22 S. W. Rep. 1026. A statement made two or three minutes before death is admissible as a dying statement, though the deceased did not say he believed he was going to die until after he had finished his declaration. *People v. Sare Bo*, 72 Cal. 623; *State v. Spencer*, 30 La. Ann. 362.

furnishes no valid ground for rejecting the declaration of the deceased, if when it was made it is shown he was fully impressed with the feeling that he would die in a short time.¹ Thus, declarations made forty-eight hours,² ten days,³ eleven days⁴ or six weeks⁵ before the death of the declarant have been received.⁶

§ 102. In what cases admissible.—The declaration of a deceased person which is offered in evidence as his dying declaration is only admissible where his death is the subject of an accusation of homicide and the circumstance of that death the subject-matter of the declaration.⁷

¹ State v. Schmidt, 73 Iowa, 469.

² Woodcock's Case, 2 Leach Cr. Cas. 563.

³ Tinkler's Case, 1 East P. C. 354.

⁴ Rex v. Mosely, 1 Mood. 97.

⁵ Fulcher v. State, 28 Tex. App. 465.

⁶ State v. Crabtree (Mo., 1892), 20 S. W. Rep. 7; State v. Bannister, 35 S. C. 290; 14 S. E. Rep. 678; Com. v. Haney, 127 Mass. 455 (four days); Kehoe v. Com., 85 Pa. St. 127 (two days). The law governing the admissibility and use as evidence of dying declarations is thus admirably summed up by the court in People v. Taylor, 59 Cal. 640: "Declarations of the deceased are admissible upon a trial for murder only as to those things as to which he would have been competent to testify if sworn as a witness in the cause. They must relate to facts only, not to mere matters of opinion. It is essential to the admissibility of such declarations, and it is a primary fact to be proved by the party offering them, that they were made under a sense of impending death. But it is not necessary that they be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger,

from the opinions of the medical or other attendants expressed to him, or from his conduct or other circumstances of the case. Such declarations must relate to the circumstances of the death; they cannot be received as proof when not connected as *res gestæ* with the death."

⁷ 1 Greenl. on Evid., § 156; Rex v. Mead, 2 B. & C. 605; People v. Fong Ah Sing, 70 Cal. 8; Marcum v. Com. (Ky., 1890), 1 S. W. Rep. 727; People v. Smith, 104 N. Y. 505; State v. Perigo (Iowa), 45 N. W. Rep. 399; People v. Davis, 56 N. Y. 96; Hines v. Com. (Ky.), 13 S. W. Rep. 445; State v. Baldwin, 79 Iowa, 714; 45 N. W. Rep. 297; United States v. Heath, 19 Wash. L. R. 818; State v. Shelton, 2 Jones' (N. C.) L. 360; State v. Nelson, 101 Mo. 464; Com. v. Cary, 12 Cush. (Mass.) 246; Crookham v. State, 5 W. Va. 510; People v. Knapp, 26 Mich. 113; Walker v. State, 52 Ala. 192. If a crime is by statute declared to be murder in case the person upon whom it was committed dies, as, for example, committing an abortion, dying declarations are generally inadmissible under the rule stated in the text, as the party is not indicted for the homicide. The fact of death is not a constituent of the crime, but affects the punishment alone. Railing v. Com., 110 Pa. St.

In this connection it may be well to distinguish clearly between declarations of deceased persons which are admissible as original evidence as a part of the *res gestæ* and those which are wholly hearsay but which are received solely because they are the dying declarations. In regard to the former it need only be said here that the grounds for their admission being their natural, contemporaneous and explanatory connection with the main transaction, they are admitted in all cases whether criminal or civil.¹ On the other hand, the declarations of the deceased not constituting a part of the *res gestæ*, but which are his dying declarations, are mainly admitted as a matter of necessity in order that homicide may not go unpunished in cases where the declarant's death is the matter of a criminal investigation. Here, if no third person was present at the instant of the homicide (and this, it is believed, is very frequently the case), it would be practically impossible to procure any direct evidence upon the main fact in issue, the mouth of the accused being closed by the policy of our law unless he shall see fit to open it.²

When the injured party, if living, would be a competent witness against the accused, no injustice will be done by admitting his language, relevant to the issue, uttered under circumstances which are considered as equal to his being sworn.³ Hence where the declarant would not have been a competent witness if alive, his *ante-mortem* declaration will not be re-

103; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78; *Maine v. People*, 9 Hun, 118; *People v. Aiken*, 15 Oregon, 137; *Wooten v. State*, 39 Ga. 223; *Starkey v. People*, 17 Ill. 21; *Johnson v. State*, 50 Ala. 456. *Contra*, *Montgomery v. State*, 80 Ind. 338; *State v. Dickinson*, 41 Wis. 299; *Com. v. Homer*, 153 Mass. 343.

¹ See *State v. Sullivan*, 51 Iowa, 142; *Walker v. State*, 63 Ala. 105; *State v. Ramsay*, 82 Mo. 133; *Howard v. State*, 23 Tex. App. 255; *Cluverius v. Com.*, 81 Va. 787; *Darby v. State*, 3 S. E. Rep. 363.

² See *State v. McCoy*, 111 Mo. 517;

Graves v. People (Colo., 1893), 32 Pac. Rep. 63; *Eiland v. State*, 52 Ala. 322; *Palmore v. State*, 29 Ark. 248; *People v. Lee Chuck* (Cal.), 15 Pac. Rep. 322; *Keener v. State*, 18 Ga. 194; *Williams v. People*, 54 Ill. 422; *State v. Elliot*, 45 Iowa, 486; *Carico v. Com.*, 7 Bush (Ky.), 124; *State v. Robinson*, — La. Ann. 340; *State v. Spalding*, 34 Minn. 361; *Hawthorne v. State*, 61 Miss. 749; *State v. Downs*, 91 Mo. 19; *State v. Matthews*, 78 N. C. 523; *State v. Dodson*, 4 Oreg. 64; *Horbach v. State*, 43 Tex. 242; *State v. Abbott*, 8 W. Va. 741; *Wood v. State*, 92 Ind. 269. See *post*, § 345.

³ 1 Greenl. on Evid., § 157.

ceived.¹ Thus, statements made by the deceased which, if he were on the stand, would be hearsay will not be received.² So, too, the declarations must be relevant, and must contain statements of facts and circumstances and not merely conclusions, mental impressions or matters of opinion,³ except in the cases where an expression of opinion would be relevant if the declarant himself were testifying in court.⁴ So a dying declaration that the killing was intentional,⁵ without reason or provocation,⁶ or for nothing,⁷ is not such an expression of opinion as will render it incompetent.

The admissibility of dying declarations does not depend upon the small amount of evidence against the prisoner,⁸ or upon the plea in defense, whether it is an *alibi*, insanity or self-defense.⁹ Like all preliminary questions bearing upon the admissibility of evidence, the determination whether a dying declaration is to be received is for the judge upon all the facts involved.¹⁰

To obviate the creation of prejudice against the accused in the minds of the jurors, it is advisable, as a matter of practice, to examine the witness out of their presence and hearing.¹¹ It

¹ Reg. v. Perkins, 9 C. & P. 395; State v. Thomason, 1 Jones' (N. C.) Law, 274; State v. Foot Yon (Oreg., 1893), 33 Pac. Rep. 537; North v. People, 139 Ill. 81.

² Johnson v. State, 17 Ala. 618.

³ State v. Williams, 67 N. C. 12; State v. Elkins, 14 S. W. Rep. 116; 101 Mo. 344; State v. Perigo, 45 N. W. Rep. 399; 80 Iowa, 37; State v. Saunders, 12 Pac. Rep. 441; State v. Black, 42 La. Ann. 861; 8 S. Rep. 594; State v. O'Brien (Iowa, 1891), 46 N. W. Rep. 752; Matherly v. Com. (Ky., 1892), 19 S. W. Rep. 977; Jones v. State, 52 Ark. 345; Scott v. People, 63 Ill. 508; People v. Olmstead, 30 Mich. 431. See *post*, §§ 186, 187.

⁴ Brotherton v. People, 75 N. Y. 159; State v. Foot Yon (Oreg., 1893), 33 Pac. Rep. 537.

⁵ Boyle v. State, 105 Ind. 470; State v. Nettlebush, 20 Iowa, 257; Payne v. State, 61 Miss. 161.

⁶ State v. Black, 42 La. Ann. 861; Wroe v. State, 20 Ohio St. 460.

⁷ Roberts v. State, 5 Tex. App. 141.

⁸ Luker v. State (Ky., 1888), 5 S. W. Rep. 354.

⁹ Boyle v. State, 105 Ind. 469. A failure to object promptly to a declaration as inadmissible because consisting of opinion waives the objection. State v. O'Brien, 81 Iowa, 88.

¹⁰ State v. Baldwin, 45 N. W. Rep. 297; State v. Poll, 1 Hawks, 444; McDaniel v. State, 8 Sm. & M. 401; Com. v. Murray, 2 Ashm. 41; State v. Frazier, 1 Houst. 176; Territory v. Klehn (Wash., 1889), 21 Pac. Rep. 31; Hill's Case, 2 Gratt. 594; Kehoe v. Com., 85 Pa. St. 127; Roten v. State (Fla., 1893), 12 S. Rep. 910. See *ante*, § 13. *Contra*, Dumas v. State, 62 Ga. 58.

¹¹ People v. Smith, 104 N. Y. 493; State v. Furney, 41 Kan. 115; Swisher v. Com., 26 Gratt. (Va.) 963; Price v. State, 72 Ga. 441.

is in the discretion of the court, however,¹ to hear the evidence bearing on the admissibility of the declaration in the presence of the jury, they being instructed by the court that they should not allow anything then heard to influence their verdict.²

When it has been decided that a dying declaration is admissible, its credibility and weight are wholly within the province of the jury,³ and the evidence contained in the declaration is to be weighed by them by the application of the same rules that are employed in the case of a living witness.⁴ The declaration itself can be introduced in evidence not only against the accused but in his favor as well.⁵ In case only a portion of the declaration is admissible it has been held that the incompetent portion may be stricken out on motion;⁶ but generally all that the deceased said relevant to the guilt or innocence of the accused and bearing upon the facts of the killing should be admitted, and it is error for the court to refuse to do so.⁷

So it has been held that the admission of a dying declaration does not violate a constitutional provision that the accused shall be confronted with the witnesses against him and shall hear the testimony against himself.⁸ Dying declarations as such are never admissible in civil cases, although they may be admissible upon other grounds than their *ante-mortem* character;⁹ and the same principle is observed as to their admissibil-

¹ State v. Schafer (Oreg., 1893), 32 Pac. Rep. 545.

² People v. Smith, 104 N. Y. 498; Johnson v. State, 47 Ala. 9; State v. Cain, 20 W. Va. 679; Prince v. State, 72 Ga. 441.

³ State v. McCanon, 57 Mo. 160; State v. Mathes, 90 id. 571.

⁴ Jones v. State (Miss., 1893), 12 S. Rep. 444.

⁵ People v. Knapp, 26 Md. 112; Brock v. Com. (Ky., 1892), 17 S. W. Rep. 387; Rex v. Scaife, 1 Mood. & R. 551; Felder v. State, 23 Tex. App. 477; Chittenden v. Com. (Ky., 1888), 9 S. W. Rep. 386. But a declaration of the deceased that he did not want the accused to be prosecuted will be

rejected. State v. Nelson, 101 Mo. 464.

⁶ People v. Farmer, 77 Cal. 1; 18 Pac. Rep. 800.

⁷ Mattox v. United States, 146 U. S. 140; People v. Beach, 87 N. Y. 508.

⁸ State v. Saunders, 14 Oreg. 300; Com. v. Cary, 12 Cush. 246; Campbell v. State, 11 Ga. 353; Brown v. Com., 73 Pa. St. 321; State v. Dickinson, 41 Wis. 299; Robbins v. State, 8 Ohio St. 131; People v. Murray, 52 Mich. 338.

⁹ Wooten v. Wilkins, 39 Ga. 223; Daily v. N. Y. etc. Co., 32 Conn. 356; Friedman v. Railway Co., 7 Phila. 203; Marshall v. Railroad Co., 48 Ill. 475. Cf. Cajolle v. Ferrie, 23 N. Y. 90.

ity upon the trials of indictments for all crimes when homicide is not an essential and indispensable element in the nature of the offense.¹ An apparent exception to this rule occurs in the case of the killing of two or more persons by the prisoner for the murder of one of whom he is placed on trial. Upon the ground that the two deaths are merely parts of one transaction, the dying declaration of A. has been admitted on a trial for the killing of B. where it was shown that the deaths were nearly identical in place or time, and the means adopted by the defendant in bringing about the death of B. resulted also in the death of A.² But the circumstance taken alone that the declarant's death occurred in the disturbance in which the person for whose homicide the prisoner was indicted was also killed is insufficient to admit his declaration when it is not shown that his death was directly due to some act of the defendant.³

§ 103. Form of the declaration.—That the deceased should have been formally examined or that he should be questioned as though he were upon the witness stand is never required. Dying declarations elicited by means of leading questions or urgent and persistent solicitations are receivable.⁴ The fact that deceased was under the influence of a narcotic while making his statement will not render it inadmissible,⁵ provided they are complete in themselves and nothing remains to be said by the declarant which will qualify, enlarge or restrict their meaning.⁶

¹Johnson v. State, 50 Ala. 456; State v. Bohan, 15 Kan. 407; People v. Aiken, 15 Oregon, 137; Com. v. Homer, 153 Mass. 343; Rex v. Mead, 2 B. & C. 605 (robbery); Wilson v. Boarem, 15 Johns. 286. See *ante*, § 102.

²Rex v. Baker, 2 M. & Rob. 53; State v. Terrell, 12 Rich. (S. C.) 321; State v. Wilson, 23 La. Ann. 559. *Contra*, Brown v. Com., 73 Pa. St. 321.

³State v. Westfall, 49 Iowa, 328; State v. Bohan, 15 Kan. 407.

⁴Com. v. Vass, 3 Leigh, 786; People v. Bamberly, 87 Cal. 117; North

v. People, 139 Ill. 81; 28 N. E. Rep. 966; Com. v. Haney, 127 Mass. 455; State v. Foot You (Oreg., 1893), 32 Pac. Rep. 103.

⁵Hays v. Com. (Ky., 1890), 14 S. W. Rep. 833. And where the declarant is unable to speak he may make his statement by using signs, and, however slight they may be, as, for example, squeezing the hand, his declaration is not inadmissible on that account. Com. v. Carsey, 11 Cush. 417.

⁶Com. v. Vass, 3 Leigh, 787; State v. Murdy, 81 Iowa, 88; People v. Brady, 72 Cal. 490; State v. Martin,

The dying declaration is customarily expressed in language, but this is by no means always necessary. The declaration may be by signs, where the dying person is unable to speak; as, for example, by a pressure of the hand, a nod of the head, or by pointing to visible objects or persons in response to questions put to him. Under such circumstances it should be made to appear by independent evidence that the deceased was conscious and realized his condition.¹

In all cases where the language of the deceased has been committed to writing and signed by him, or where, if he is physically unable to sign, a written statement has been read and assented to by him in the presence of attesting witnesses, the writing should be produced as the best evidence of its contents.²

When a declaration made by deceased, though committed to writing, was neither read nor signed by him, its contents may be shown verbally, though its absence be unaccounted for.³ So where some of the declaration is in writing and some is not, that which is verbal may be received though the writing is not produced.⁴ But testimony that the deceased made contradictory verbal statements will not be received to vary or qualify a writing signed and verified by him unless the witness can give the substance of the statements.⁵

As a general rule, the contradictory⁶ or untruthful character⁷ of the dying declarations constitutes no valid objection to its admission as evidence, however much it may detract from the credit to be given to it by the jury. But declara-

30 Wis. 216. Cf. *Mattox v. United States*, 146 U. S. 140. A verification under oath, while of great value, does not strengthen it as a dying declaration *per se*. *State v. Frazier*, 1 *Houst. (Del.)* 176; *Turner v. State*, 89 *Tenn.* 297.

¹ *Com. v. Casey*, 11 *Cush. (Mass.)* 417; *People v. Shaw*, 63 *N. Y.* 40.

² *King v. State*, 91 *Tenn.* 617; *People v. Callaghan*, 4 *Utah*, 49; *Drake v. State*, 23 *Tex. App.* 293. But *cf. contra*, *State v. Patterson*, 45 *Vt.* 308; *State v. Wilson*, 111 *N. C.* 695.

³ *State v. Sullivan*, 50 *N. W. Rep.*

572; 51 *Iowa*, 142; *Darby v. State*, 92 *Ala.* 9.

⁴ *Rex v. Reason*, 1 *Str.* 499, 500; *State v. Schmidt*, 73 *Iowa*, 469; *People v. Glenn*, 10 *Cal.* 32; *Krebs v. State*, 8 *Tex. App.* 1; *Com. v. Haney*, 127 *Mass.* 455.

⁵ *Snell v. State*, 29 *Tex. App.* 296; 15 *S. W. Rep.* 722; *State v. Schmidt*, 73 *Iowa*, 469; *State v. Mathes*, 90 *Mo.* 571.

⁶ *Richards v. State*, 82 *Wis.* 172; 51 *N. W. Rep.* 652.

⁷ *White v. State*, 30 *Tex. App.* 652; 18 *S. W. Rep.* 462.

tions made by the deceased which contradict his dying declarations are admissible to impeach the latter, though they are not made under a sense of impending death.¹

The witness called to prove the declaration is not under the necessity of repeating its exact language provided he can give the substance of all statements in a connected and complete form.²

¹ Morelock v. State, 90 Tenn. 528. v. People, 17 Ill. 17; Montgomery v.

² People v. Chin Mock, 51 Cal. 597; State, 11 Ohio, 424; Mattox v. United States, 146 U. S. 140.
Roberts v. State, 5 Tex. App. 141; States, 146 U. S. 140.
McLean v. State, 16 Ala. 672; Stark

CHAPTER VIII.

ANCIENT DOCUMENTS.

<p>§ 105. Definition. 106. Documents must come from proper custody.</p>	<p>§ 107. Execution need not be proved, 108. Extent of corroboration required.</p>
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§ 105. Definition.— Another class of exceptions to the rule rejecting hearsay evidence comprises those cases in which a claim to possession is sought to be substantiated by the production in evidence of what are termed *ancient documents*.¹ To constitute an ancient document, the deed, record or other written instrument must be at least thirty years old when offered in evidence,² and, while it is by no means necessary that the documents should, in strictness of language, be shown to form a part of the *res gestæ*, these instruments are generally connected collaterally with some of the facts which are in issue. The law raises a very strong presumption in favor of the authenticity and genuineness of such documents, and even when these characteristics are impeached by affidavits which assert the fraudulent nature of their contents or that the document is a forgery, it is held that the party offering the ancient document is not under the necessity of disproving the charge.³

¹ 1 Greenl. on Evid., § 141.

² Mapes v. Leal, 27 Tex. 345; Whitman v. Henneberry, 73 Ill. 109; McGennis v. Allison, 10 S. & R. (Pa.) 197. It is not enough that the document purports to be over thirty years old. Fairly v. Fairly, 38 Miss. 280; Whitman v. Henneberry, *supra*. In the case of a will the thirty years would in America be counted from the death of the testator. Jackson v. Blanshan, 3 Johns. (N. Y.) 292; Gardner v. Grannis, 57 Ga. 539; Jackson v. Luquere, 5 Cow. 221, 224; Hewlett v. Cook, 7 Wend. 374. But the English courts reckon from the date of

the will. Doe v. Deakin, 3 Carr. & P. 402.

³ Winn v. Patterson, 9 Pet. 675; McWhirter v. Allen, 1 Tex. Civ. App. 649; Williams v. Conger, 125 U. S. 397; Settle v. Alison, 8 Ga. 201; Parker v. Chancellor, 11 S. W. Rep. 503; 73 Tex. 475; Stribling v. Atkinson, 79 Tex. 162; Bennett v. Runyon, 4 Dana, 422; Norton v. Conner, 14 S. W. Rep. 193; Northrop v. Wright, 24 Wend. 221. *Contra*, Parker v. Waycross, etc. Co., 81 Ga. 387. Cf. Almy v. Church (R. I., 1893), 26 Atl. Rep. 58.

§ 106. Documents must come from proper custody.—In the case of an ancient conveyance produced to substantiate the claim of one in possession, the fact of a long, continuous and uninterrupted seizin by the claimant is often a very material circumstance¹ in rebutting any presumption or suspicion which may arise that the instrument was fabricated. The fact that the deed has always been in the possession of the party claiming under it does not militate against its reception.

In all cases, however, where ancient documents are offered as proof, it is required as *prima facie* evidence of their genuineness that they shall be produced from the proper custody.² In no case is it necessary that the custody in which the document has been found should be the best, safest and most proper repository. Of course, where such is shown to be the case, all trace of suspicion as to their genuineness is removed.³

When, however, documents are produced and it is shown that they have been in the hands of those who from the circumstances of the case it was reasonable and probable to suppose would naturally have had charge of them, then the requirements of the law have been complied with, even though a safer place of custody might have been found.⁴ In other

¹ 1 Greenl. on Evid., § 141; King v. Merrill, 34 N. W. Rep. 689; Smith v. Swan (Tex., 1893), 22 S. W. Rep. 247; Wilson v. Simpson, 16 S. W. Rep. 40; 80 Tex. 279. See § 108. Where the authenticity of an ancient deed is free from suspicion, the courts follow a liberal rule as to their admission. Doe v. Keeling, 11 Q. B. 884.

² Doe v. Roe, 31 Ga. 593; Goodwin v. Jack, 62 Me. 414; Carter v. Chandron, 21 Ala. 72; Weitman v. Jhiot, 64 Ga. 11; Bell v. Brewster, 44 Ohio St. 694; Hedger v. Ward, 15 B. Mon. (Ky.) 106; Tolman v. Emerson, 4 Pick. (Mass.) 160; Duncan v. Beard, 2 Nott & McCord (S. C.), 400; King v. Sears (Ga., 1893), 18 S. E. Rep. 830; Applegate v. Lexington, etc. Mining Co., 117 U. S. 263; Williams v.

Conger, 125 U. S. 417. *Contra*, Harris v. Hoskins, 22 S. W. Rep. 251.

³ As in the case of a military payroll found in the custody of the secretary of war. Bell v. Brewster, 10 N. E. Rep. 679. See, also, Whitman v. Henneberry, 73 Ill. 109; United States v. Castro, 24 How. 346; King v. Little, 1 Cush. (Mass.) 436; Jack v. Blanshan, 3 Johns. (N. Y.) 292. The question whether a deed comes from proper custody is for the judge. Rees v. Walters, 3 M. & W. 527, 531. But where an ancient deed is admitted in evidence against the objection of the grantor, who denies its execution, its genuineness is for the jury. Stooksberry v. Swan (Tex., 1893), 21 S. W. Rep. 694.

⁴ Bishop of Meath v. Marquess of Winchester, 3 Bing. N. C. 183.

words, the proper repository or custody for an ancient document is the place where papers of its kind are usually deposited.¹ Thus, in the case of deeds conveying interests in real property, the proper because usual custodian is the grantee of the deed or those claiming under him by force of its operation.² So the lessor is the proper custodian of an expired lease;³ and in regard to any document the question of what is its proper custody is one of law and exclusively for the consideration of the judge.⁴

§ 107. Execution need not be proved.—It is never required to prove ancient documents. It is a conclusive presumption arising from lapse of time that the witnesses together with those who might identify their writing are dead.⁵ The witnesses need not be called,⁶ even though living within the jurisdiction⁷ or in the court.⁸ Slight irregularities appearing on the face of such documents will be disregarded.⁹ The existence of a power of attorney,¹⁰ of capacity in the grantor,¹¹ or the authenticity of a seal attached to the writing,¹² will be presumed. But a copy of an ancient document, even though over fifty years old, is not admissible, unless the execution of the original is proved;¹³ nor can a sheriff's deed be considered

¹ Greenl. on Evid., § 142, citing *Barr v. Gratz*, 4 Wheat. 213, 221; *Winn v. Patterson*, 9 Pet. 663; *Jackson v. Laroway*, 3 Johns. 333; *Hewlett v. Cock*, 7 Wend. 371, 374; *Tolman v. Emerson*, 4 Pick. 160; *Duncan v. Beard*, 2 Nott & McC. 400; *Shinn v. Hicks*, 68 Tex. 277; *Bell v. Brewster*, 44 Ohio St. 690; *Brown v. Simpson's Heirs*, 67 Tex. 225; *Almy v. Church* (R. L., 1893), 26 Atl. Rep. 58. Cf. *Harris v. Hoskins* (Tex., 1893), 22 S. W. Rep. 251.

² *Parker v. Chancellor*, 73 Tex. 475. The proper custodian of a deed of a land certificate is the person who filed the certificate. *Masterson v. Todd* (Tex., 1893), 24 S. W. Rep. 682.

³ *Doe v. Keeling*, 36 Leg. Obs. 312.

⁴ *Rees v. Walters*, 3 M. & W. 527.

⁵ *Winn v. Patterson*, 9 Pet. 675; *Havens v. Sea Shore Railroad*, 20

Atl. Rep. 497; *Crain v. Huntington*, 81 Tex. 614; *Von Rosenberg v. Haynes* (Tex., 1892), 20 S. W. Rep. 143; *Northrop v. Wright*, 24 Wend. 221; *McClaskey v. Barr*, 47 Fed. Rep. 154; *Parker v. Chancellor*, 73 Tex. 475; *Ruby v. Van Valkenberg*, 72 id. 459.

⁶ *Barr v. Gratz*, 4 Wheat. 213.

⁷ *Jackson v. Christman*, 4 Wend. (N. Y.) 277.

⁸ *Marsh v. Colnett*, 2 Esp. 665.

⁹ *Johnson v. Timmons*, 50 Tex. 521; *Hogan v. Corinth*, 19 Fla. 84.

¹⁰ *Storey v. Flanagan*, 57 Tex. 649; *Lum v. Scarborough* (Tex., 1893), 24 S. W. Rep. 846; *Doe v. Campbell*, 10 Johns. (N. Y.) 475.

¹¹ *Rex v. Inhabitants*, 1 B. & C. 573.

¹² *Hooper v. W. W. Co.*, 37 Hun. 568.

¹³ *Schunior v. Russell*, 83 Tex. 83; 18 S. W. Rep. 484.

an ancient document which does not recite the court or county in which it was issued.¹ So, also, an unrecorded deed showing neither the place of its execution nor the fact of its delivery will be rejected unless its due execution is proved.²

§ 108. **Extent of corroboration required.**—Some uncertainty at one period existed as to the necessity for the introduction of evidence tending to show acts done in reference to the documents offered in evidence. Where a deed or other document is extremely old, to require evidence of an act done contemporaneously with its execution as a necessary preliminary to its reception as evidence would be often tantamount to rejecting it.³ If, as is conceivable, the writing is dated *post litem motam*, a suspicion will thereby be cast upon its genuineness and impartiality which will cause the court to demand evidence of co-existing facts to dissipate.⁴ So where evidence of comparatively recent facts which have occurred subsequent to the execution of the document is demanded, no objection can with fairness be made. Thus, if the document be a deed produced by the grantee who claims under it, and it is stated by him to have been in his possession for a period of time sufficient to give it the character of an ancient document, he will ordinarily be required to give evidence showing his enjoyment of the property conveyed therein, or some other competent facts sufficiently corroborative. So it was at one time held that in such a case proof of possession in corrobora-

¹ French v. McGinnis, 69 Tex. 19. See as to administrator's deed, Fell v. Young, 63 Ill. 106.

² Long v. Georgia, etc. Co., 82 Ga. 628. See Boyle v. Chambers, 32 Mo. 46; Smith v. Rankin, 20 Ill. 14; Fogal v. Perio, 10 Bosw. (N. Y.) 100; Clark v. Owens, 18 N. Y. 434; Coulson v. Walton, 9 Pet. 62, where proof of ancient documents was required.

³ Bristow v. Cormican, L. R. 3 App. Cas. 641. Cf. Gardner v. Granis, 57 Ga. 539. "The evidence of such ancient documents is admitted upon the ground that although between

strangers they are of such character as usually accompanies transfers of title or acts of possession and purport to form a part of actual transactions referring to co-existing subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated. But platting for plans and field-notes are memoranda only, which may never have been acted upon." Boston Water-Power Co. v. Hanlon, 132 Mass. 484.

⁴ 1 Greenl. on Evid., § 143; United States v. Castro, 24 How. 346.

tion of the deed was indispensable.¹ On the other hand, it has been repeatedly held that the genuineness of a deed purporting to be an ancient document, if coming from proper custody, may be established by proof of circumstances other than possession or acts of ownership under it.² Thus, a certificate of registration of an ancient deed being itself more than thirty years old is admissible as evidence of the antiquity and genuineness of the deed itself.³

Where proof of possession is required it has been held in some cases that thirty years' possession was necessary,⁴ while other cases hold that possession for any particular period need not be shown.⁵ So it seems that possession of part of the premises is enough,⁶ and the document may be admitted in evidence without prior proof of possession.⁷

¹ Jackson v. Laroway, 3 Johns. Cas. 283; Jackson v. Blanshan, 3 Johns. 292, 298. See Gardner v. Grannis, 57 Ga. 539; Thurston v. Masterson, 9 Dana (Ky.), 285; Nixon v. Porter, 34 Miss. 697; Homer v. Cilley, 14 N. H. 85; McGennis v. Allison, 10 Serg. & R. (Pa.) 197; Thompson v. Bullock, 1 Bay (S. C.), 364; Bank of Middlebury v. Rutland, 33 Vt. 414; Dishazer v. Maitland, 12 Leigh (Va.), 524.

² Barr v. Gratz, 4 Wheat. 213; Wilson v. Betts, 4 Denio, 201; Jackson v. Luquere, 5 Cow. 221; Hewlett v. Cock, 7 Wend. 371; Kenerson v. Henry, 101 Mass. 152; Jackson v. Lamb, 7 Cowen, 431; Prigden v. Green (Ga., 1888), 7 S. E. Rep. 97; Lawrence v. Tennant, 64 N. H. 532; Ammons v. Dwyer, 78 Tex. 639; Parker v. Chancellor, 73 Tex. 475; Ruby v. Van Valkenburg, 73 Tex. 450; Com. v. Heffron, 102 Mass. 161; Fulkerson v. Holmes, 117 U. S. 389; Applegate v. Mining Co., 117 id. 255; Nowlin v. Burwell, 75 Va. 551; Ensign v. McKinney, 30 Hun (N. Y.), 249; Harlan v. Howard, 79 Ky. 373; Whitman v. Henneberry, 73 Ill. 109; Brown v. Wood, 6 Rich. (S. C.) Eq. 155; Williams v. Hardee (Tex., 1893), 21 S. W. Rep. 267.

³ Prigden v. Green, *supra*. In *Bristow v. Cormican*, L. R. 3 App. Cas. 641, Blackburn, J., said: "Inasmuch as, after a long time, all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence, from which the jury may properly draw an inference that there was such possession. For, in the ordinary course of things, men do not make leases unless they act on them, and lessees do not, in general, pay rent unless they are in possession, so that ancient payment of rent adds weight to the ancient indenture."

⁴ Nowlin v. Burwell, 75 Va. 551; Jackson v. Blanshan, 3 John. 292, 298; Shaler v. Brand, 6 Binn. 439.

⁵ Bank v. Rutland, 33 Vt. 414; Nixon v. Porter, 34 Miss. 697; Waldron v. Tuttle, 4 N. H. 371; Ridgely v. Johnson, 11 Barb. (N. Y.) 527.

⁶ Jackson v. Luquere, 5 Cow. (N. Y.) 221.

⁷ Hoopes v. Burgin W. W. Co., 37 Hun, 568; Burgin v. Chenault, 9 B. Mon. (Ky.) 285; Shaler v. Brand, 6 Binn. (Pa.) 435.

CHAPTER IX.

GENERAL REPUTATION.

§ 110. Adequate knowledge of declarant.	§ 114. Evidence of reputation in the case of private rights.
111. Identity of declarant.	115. Traditionary evidence regarding private boundaries.
112. Death of declarant.	116. Documents showing general reputation.
113. Date of the declaration.	

§ 110. Public and general reputation — Adequate knowledge of declarant.—By reputation is meant what a community thinks, believes or says, and not merely the declaration of a single person as to a particular fact not of a public nature.¹ As regards subjects or rights which are of general or public interest, and which, therefore, concern all or a considerable portion of the community, evidence of declarations constituting general reputation and tending to show how such matters were regarded by those who were most interested is admissible as an exception to the rule rejecting hearsay. If the matter concerned all the citizens, as, for example, the dedication of a public highway and its enjoyment and use by the inhabitants of a town,² or the exercise of some franchise by a public corporation or official, it is a presumption that, such things being the theme of interested and widespread discussion, the utterances of persons who are necessarily interested in public matters must be reliable and true.

But the admissibility of hearsay evidence of general reputation is limited by the consideration of the question whether the person whose language is quoted was in a position to possess and did actually have sufficient knowledge. Thus, if it be a matter of public cognizance affecting a large class of persons, the declarations of any of them, no matter how scattered the class may be, are admissible. A distinction is

¹ Anderson's Law Dict., citing *Hunnicutt v. Peyton*, 102 U. S. 363. 1893), 21 S. W. Rep. 779; *Crease v. Barrett*, 1 C., M. & R. 919; *Lawrence*

² *Albert v. Gulf, etc. Co.* (Tex., v. Tennant, 64 N. H. 532.

drawn, however, by the adjudged cases and by the authorities upon this subject between public rights or customs and general rights or customs. A public right is a right which is common to all the citizens of a state or of any large governmental division, while a general right is one which is common to a considerable though limited number of persons; as, for example, to the residents of a parish, township or similar circumscribed district.¹

In the case of public rights, declarations showing reputations, made by persons deceased, are deemed competent without preliminary proof that the party had full knowledge of the matter involved.² But declarations concerning general rights known only among a relatively small number of persons are not admissible unless it is shown that the party had competent means of knowledge.

On the other hand, the declarations of persons as to general reputation who have resided in a circumscribed district will not be rejected on that account if it can be shown that the matter upon which they have a bearing was such that those persons would have been likely to possess adequate knowledge.³ In the latter case, however, evidence of reputation current elsewhere than the locality in question would not be received.⁴

It is not necessary that the main fact in issue should be of a public or general nature. Though the litigation turn upon a private right, evidence of public reputation is admissible to show some public and general right out of which it sprang or with which it may be connected.⁵

¹ Stephen's Digest, art. 30; 1 Greenl. on Evid., § 128; Weeks v. Sparks, 1 M. & S. 686, 690.

² Freeman v. Phillips, 4 M. & S. 486.

³ Mullaney v. Duffy (Ill., 1893), 33 N. E. Rep. 250; Green v. Mumper, 138 Ill. 434; Hunnicutt v. Peyton, 102 U. S. 333; Wood v. Fiske, 62 N. H. 173; Dugger v. McKesson, 100 N. C. 1; Milford v. Powner, 126 Ind. 528; State v. Best, 12 S. E. Rep. 907; Taylor v. Glenn, 29 S. C. 292.

⁴ 1 Greenl. on Evid., § 128; Noyes

v. White, 19 Conn. 250; Dunbar v. Mulvy, 8 Gray, 163; People v. Vellarde, 59 Cal. 457; Hodges v. Hodges, 11 S. E. Rep. 364; 106 N. C. 374; Young v. Kansas City, F. S. & M. R. Co., 39 Mo. App. 59.

⁵ Young v. Kansas City, etc. Co., 39 Mo. App. 53; Weeks v. Sparke, 1 M. & S. 679; Sanscrainte v. Torongo, 87 Mich. 69; Buttrick v. Tilton, 155 Mass. 461; 29 N. E. Rep. 1088; Backdahl v. Grand Lodge, 48 N. W. Rep. 454; Tucker v. Smith, 3 S. W. Rep. 671;

§ 111. **Identity of informant or declarant.**—A witness who is permitted to testify to statements made by a person deceased upon the ground that such utterance was evidence of general reputation will not be required to give the name of his informant.¹ Nor is such a declaration rejected though the witness' informant, had he been living, would not have been a competent witness because of interest. The fact that the deceased was in a position to have a full knowledge of the subject and that at the date of making his declaration he was seemingly impartial being the sole grounds for the admission of his declaration renders it unnecessary to consider his other characteristics or qualifications.²

§ 112. **Death of declarant.**—But it is also a rule that the declarant should be dead or should be supposed to be so at the time of trial. If such is not the case, evidence of reputation will be rejected and his oral testimony will be required as original evidence in conformity with the doctrine that hearsay evidence is never received when original evidence can be obtained.³ It was at one time held, when title to real property was in dispute, that evidence of general reputation was only admissible in case the party could show actual enjoyment of the property prior to its reception.⁴ Such, however, is not now the law, though evidence of enjoyment would have great corroborative force.⁵

§ 113. **Date of the declarations ante litem motam.**—In considering the admissibility of such declarations as evidence of common or general reputation, the date at which the declarations were made must be considered. As common report is only admitted as evidence in matters which concern the public, it is valueless where it is infected with bias or partiality because the declarant's "mind does not stand in an even position without any temptation to exceed or fall short of the

Lord Dunraven v. Lewellyn, 15 Q. B. 785; Warrick v. Queen's College, 40 L. J. C. 785. Tucker v. Smith, 68 Tex. 473; 3 S. W. Rep. 671.

⁴ Moorewood v. Wood, 14 East, 330.

¹ Mosely v. Davis, 11 Price, 162.

⁵ Curson v. Lomax, 5 Esq. 90;

² 1 Greenl. on Evid., § 135.

Steele v. Prickett, 2 Stark. 463, 466.

³ Lawrence v. Tennant, 64 N. H. 532; Hodges v. Hodges, 106 N. C. 374; See, also, cases cited under §§ 115 and 116.

truth.”¹ If, therefore, the matter upon which evidence of reputation is sought has become the subject of a general or public controversy, so that men, having begun to arrange themselves upon different sides, have thus acquired distorted views and have allowed the knowledge which they possess to be biased by passion or prejudice, their declarations will be no longer admissible as reputation. Hence, all declarations made before the suit but since the commencement of the controversy, that is, since that “state of facts has arisen upon which the claim in issue is based,” are excluded.²

The controversy which will render the declarations inadmissible must be precisely the same as that before the court. The general discussion of allied or collateral controverted subjects, so long as the point litigated was not then in dispute, will not bring about the rejection of evidence of general reputation, for here the point which is on trial cannot be said to have been in controversy at all.³ The fact that the declarant was wholly unaware of the existence of any controversy is not enough to render admissible his utterances made subsequent to its inception. He might have known of it, and, as he is always absent and usually dead when the matter is under judicial consideration, it is practically impossible to prove either that he did or did not. It is therefore fair to presume that, the controversy being upon a subject of general interest, the declarant was informed as to its existence, and that his mind was not uninfluenced by it.⁴

If the declarations as dated are *ante litem motam*, they will not be inadmissible because made expressly to prevent a controversy,⁵ or directly in support of the title or right of the declarant,⁶ though this fact may be considered as bearing upon credibility. Neither is the fact that the declarant stood or

¹ *Whitelocke v. Baker*, 13 Ves. 514, per Lord Eldon.

² *Hodges v. Hodges*, 106 N. C. 374; *Berkley Peerage Case*, 4 Campb. 404; *Rex v. Cotton*, 3 Campb. 444, 446; *Partridge v. Russell*, 2 N. Y. S. 529; 50 Hun, 601; *Richards v. Bassett*, 10 B. & C. 657; *Butler v. Mountgarret*, 7 H. L. Cas. 633; *Davies v. Lowndes*,

7 Scott N. R. 214; *Donohue v. Whitney*, 15 N. Y. S. 632.

³ *Freeman v. Phillips*, 4 M. & S. 486, 497; *Stephen's Dig.*, art. 3.

⁴ 1 Greenl. on Evid., § 133.

⁵ *Goodright v. Mass*, 2 Cowp. 591; *Monkton v. Attorney-General*, 2 R. & M. 147, 160, 164; *Slaney v. Wade*, 1 M. & C. 338.

⁶ *Doe v. Davis*, 10 Q. B. 314, 325.

believed that he stood *in pari jure* with the party introducing the declaration enough to render it inadmissible;¹ for the fact that he was *in pari casu* with the party would furnish him with an excellent opportunity of acquiring adequate knowledge, while it would hardly prejudice him in a party's favor prior to the existence of any actual controversy.

§ 114. Evidence of reputation in case of private rights.—

The possession of competent knowledge by the informant of the witness being essential to the admissibility of evidence of reputation, it follows that, as to matters wholly private, evidence of reputation is rejected upon the presumption that he did not possess such knowledge, coupled with the impossibility of showing affirmatively that he did possess it. To permit or require proof that a person long since deceased, whose very name has been perhaps forgotten or is unknown, was probably informed concerning a subject-matter which related to one individual alone, would open the door to fraud and perjury, and cast doubt and suspicion upon all testimony of this sort. The main question in issue may be one of purely private right.² But the question must have possessed such a public or *quasi*-public interest as to have been the subject of discussion by a portion of the public, however limited.

Publicity is largely relative, and matters which in one section of the community are the subject of continual public discussion would elsewhere be disregarded by all except those directly concerned. In populous cities the discussion of purely private affairs is not carried on to such an extent as in sparsely settled communities, where a dearth of incident renders any event, however private and trivial, the subject of general if not public discussion. These well-recognized facts should be

¹ Taylor, Ev. 565, 566; Deade v. Ellis v. State (Tex., 1893), 24 S. W. Hancock, 13 Price, 236, 237; Freeman v. Phillips, 4 M. & S. 486, 491; Nichols v. Parker, 14 East, 331; Doe v. Tarver, Ry. & M. 141, 142.

² It is for this reason that a person's insolvency or insanity, being a private matter, cannot be proven by evidence of general reputation. Walker v. Forbes, 25 Ala. 189; Vaughan v. Warnell, 26 Tex. 117; 691. So evidence of a general report that a person has changed his residence is not admissible under the rule admitting reputation. Ferguson v. Wright (N. C., 1894), 18 S. E. Rep.

borne in mind when evidence of reputation of matters seemingly private is admitted. In all such cases it will be found that the subject, by reason of surrounding circumstances, possessed at least a *quasi*-public character and was naturally the subject of discussion by those in the neighborhood.¹

It is sometimes said that the marriage of parties competent to enter into the marriage contract may be inferred or proved by the reputation of marriage. It is perhaps more correct to say that reputation is an incident from which, in conjunction with cohabitation, a valid marriage may be presumed to exist. In any case the reputation of marriage should be general among the acquaintances and relatives of the parties.²

§ 115. Traditionary evidence regarding private boundaries.—The rule is well established that at common law evidence of general reputation is not admissible in matters of private right or interest. Hence, though the boundary lines between public territorial divisions, however small, can be shown by such evidence, it is not permissible to do so in the case of boundaries between the adjacent lands of private owners, unless the private boundary is identical with a public boundary.³

¹ *Jennings v. Bank*, 8 Mich. 181; *Curtis v. Aaronson*, 49 N. J. L. 68; *Reed v. State*, 16 Ark. 499; *Russell v. Stockton*, 8 Conn. 236; *Adams v. State*, 25 Ohio St. 584; *Richards v. Bassett*, 10 B. & C. 657; *Green v. Mumper*, 138 Ill. 434; *Price v. Littlewood*, 3 Camp. 288; *White v. Lisle*, 4 Madd. 214; *Bryan v. Walton*, 20 Ga. 480; *Hard v. Brown*, 18 Vt. 87; *Elliott v. Pearl*, 10 Pet. 412.

² "Reputation is an incident from which, being joined to cohabitation, the married relation may be inferred. It is essential, however, that the reputation of marriage be general. The conduct of the parties must be such as to make almost every one infer that they were married. It is the reputation arising from holding themselves out to the world as occupying that relation to which the law

refers. It is not enough that an opinion may exist that they ought to be married from their intimacy; it is the belief that they are married which constitutes the reputation of it. Their acts should be inconsistent with any other inference than that of marriage to justify the repute of it, and this repute should be credited by their relatives, neighbors, friends and acquaintances." *Brinckle v. Brinckle*, 34 Leg. Int. 428. See, also, *Arthur v. Broadnax*, 3 Ala. 375; *White v. White*, 82 Cal. 427; 23 Pac. Rep. 276; *In re Wallace's Estate*, 25 Atl. Rep. 260; 49 N. J. Eq. 530.

³ *Curtis v. Aaronson*, 7 Atl. Rep. 886; 49 N. J. L. 68; *Thomas v. Jenkins*, 1 N. & P. 588; *Doe v. Thomas*, 14 East, 323; *Weeks v. Sparke*, 1 M. & S. 688; *Dunraven v. Llewellyn*, 15 Q. B. 791; 15 Ad. & El. 791; *Taylor*

In the United States some exceptions to this doctrine have occurred. It has been held in many states that evidence of declarations tending to show common reputation is admissible in the case of private boundaries irrespective of the fact that they do not coincide with boundaries of a public nature.¹ The origin of this doctrine is to be accounted for by the mode in which the government, whether state or federal, or other original proprietor of the land caused it to be surveyed and divided preparatory to its conveyance to those who subsequently cultivated it.

In the West particularly, the public domain was by act of congress surveyed and divided into townships, sections and subdivisions of sections, and in making conveyances of the lands to private individuals reference was made to these *quasi*-public boundary lines.

So in the East the large domains granted by the crown had been subdivided by surveyors into numerous small farms by intersecting lines extending from one boundary of the tract to the other.

Thus in both classes of cases it happened that lines of a public or *quasi*-public nature have become absolutely identical with private boundary lines, so that the exception to the rule of the English common law is more apparent than real.

It has been held in many cases where private and public

v. Roe, 4 Hawks, 116; *Ralston v. Wooster*, 15 id. 412; *Taylor v. Judd*, Miller, 3 Rand. (Va.) 44; *Morris v. 62 id. 288*; *Wentman v. Haywood*, 77 Callanan, 105 Mass. 129; *Drury v. Tex. 557*; *Dugger v. McKesson*, 100 Midland R. R. Co., 127 id. 571; *Mullaney v. Duffy* (Ill., 1893), 33 N. E. N. C. 1; 6 S. E. Rep. 746; *Arneson v. Spann* (S. D., 1892), 49 N. W. Rep. 1066; *Harris v. Oakley*, 130 N. Y. 1; *Smith v. Powers*, 15 N. H. 546; *Lay v. Neville*, 25 Cal. 545; *Austin v. Andrews*, 71 Cal. 98; *Smith v. Shackelford*, 9 Dana, 452; *McCoy v. Galloway*, 3 Ohio, 283; *Partridge v. Russell*, 2 N. Y. S. 529; *Nixon v. Porter*, 34 Miss. 697; *Yates v. Shaw*, 24 Ill. 367; *Roberts v. Preston*, 100 N. C. 243; *Stroud v. Springfield*, 28 Tex. 649; *Hunnicut v. Peyton*, 102 U. S. 333; *Abert v. Van Gelder*, 33 N. Y. 513.

¹ *Boardman v. Reed*, 6 Pet. 328; *Donohue v. Whitney*, 15 N. Y. S. 622; *Com. v. Penn.*, 1 Pet. C. C. 496; *Sasser v. Herring*, 3 Dev. (N. C.) 340; *Wooster v. Butler*, 13 Conn. 309; *Stetson v. Freeman*, 35 Kan. 523; *Spear v. Coate*, 3 McCord (S. C.), 227; *Jackson v. McCall*, 10 Johns. 377; *Wood v. Fiske*, 62 N. H. 173; *Great Falls v.*

boundaries were not coincident that declarations of deceased persons were admissible to show private boundaries, even where they are not declarations against interest or in disparagement of the title of the declarant.¹ So the declarations of a deceased or absent surveyor in the form of maps, surveys or plats are received to explain ambiguous or doubtful conveyances, particularly when they are referred to therein.² Usually, however, it is said that the declarations must have been made by some one in possession of the land as owner at the time, though they need not then be against interest when they will be admissible as part of the *res gestæ*.³ But the declarations of third persons not against interest who have competent knowledge, made on the land, but which do not range themselves under either of the above heads, will be received. Thus, a verbal statement of a deceased surveyor who had no interest in the land, but who may have surveyed it, will be received, though such evidence can hardly be called general reputation.⁴

§ 116. Writings showing general reputation.—Not only are verbal statements of deceased persons received as evidence of general reputation, but written instruments such as maps

¹ Whitman v. Haywood, 77 Tex. 557; Daggett v. Shaw, 5 Met. (Mass.) 223; Curtiss v. Aaronson, 49 N. J. L. 68; Adams v. Swansea, 116 Mass. 591; Sharp v. Blankenship, 79 Cal. 411; Fellows v. Smith, 130 Mass. 378; Lawrence v. Tennant, 64 N. H. 532. *Contra*, Titterington v. Trees, 78 Tex. 567; Taylor v. Glenn, 29 S. C. 292.

² Curtiss v. Aaronson, 49 N. J. L. 68; 7 Atl. Rep. 886; Davidson v. Arledge, 97 N. C. 172; Coles v. Yorks, 36 Minn. 338; 31 N. W. Rep. 353.

³ Roberts v. Medbury, 132 Mass. 200; Fowler v. Stimpson, 79 Tex. 611; Wood v. Fiske, 62 N. H. 173; Royal v. Chandler, 87 Me. 119; 21 Atl. Rep. 842; Brown v. Kenyon, 108 Ind. 284; Harris v. Oakley, 130 N. Y. 1; Curtiss v. Aaronson, 49 N. J. L. 75; Austin v. Andrews, 77 Cal. 98; 16 Pac. Rep. 546; Whitman v. Haywood, 77 Tex. 557.

⁴ Child v. Kingsbury, 46 Vt. 47; Hadley v. Howe, 46 Vt. 112; McCausland v. Fleming, 63 Pa. St. 36; Hurt v. Evans, 49 Tex. 311; Donohue v. Whitney, 15 N. Y. S. 622. In Hunicutt v. Peyton, 102 U. S. 333, the court says: "In questions of private boundaries, declarations of particular facts as distinguished from reputation are not admissible unless made by persons who had knowledge of that whereof they spoke and who were on the land or in possession of it when the declarations were made; and these to be evidence must have been made while the declarant was pointing out or making the boundaries or discharging some duty relating thereto." *Cf.* Royal v. Chandler, 83 Me. 151; 21 Atl. Rep. 842; Titterington v. Trees, 78 Tex. 567.

prepared by deceased persons,¹ deeds and leases,² decrees and orders of court,³ and similar evidential instruments⁴ are received under the rules and limitations considered in the preceding sections as applicable to this class of exceptions.⁵ It is immaterial that the documents are private if the subject-matter to which they testify is one calculated to have interested all or any considerable portion of the public, and if it is probable that the author of the writing possessed competent knowledge of the matters which are described therein. Thus, it is a general rule that maps and plats showing the public or *quasi*-public boundary lines, or which tend to prove a dedication by a private owner of lands to public uses as highways or parks, are admissible to show the general reputation regarding such matters.⁶

¹ See §§ 115, 145; *Donohue v. Whitney*, 15 N. Y. S. 622; *Ayers v. Watson*, 137 U. S. 584; 11 S. Ct. 201.

² *Plaxton v. Dare*, 10 B. & C. 17.

³ *Duke of Newcastle v. Braxtowe*, 4 B. & Ad. 273.

⁴ *Crease v. Barrett*, 1 C., M. & R. 928; *Clarkson v. Woodhouse*, 5 T. R. 412.

⁵ *Taylor v. Cook*, 8 Price, 650; *Barnes v. Mawson*, 1 M. & S. 77; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; *Beaufort v. Smith*, 4 Ex. 450; *Donohue v. Whitney*, 15 N. Y. S. 622; *Foss v. Hinkel* (Cal., 1891), 25 Pac. Rep. 762.

⁶ *Morris v. Callanan*, 105 Mass. 129; *Los Angeles, etc. Co. v. Los Angeles* (Cal., 1893), 32 Pac. Rep. 240; *Noyes v. White*, 9 Conn. 250; *Attorney-General v. Abbott*, 154 Mass. 423; *Brown v. Stark*, 83 Cal. 636; *People v. Hibernia Sav. Bank*, 84 Cal. 634. Proof of any particular instance when the right was exercised is not required in the case of a public or private right shown to exist by written evidence of common reputation. *Doe v. Sisson*, 12 East, 62; *Beebe v. Parker*, 5 T. R. 26, 32.

CHAPTER X.

STRANGERS' DECLARATIONS AGAINST INTEREST.

§ 117. Declarations of third persons and other declarations distinguished.	§ 119b. The knowledge of the declarant.
118. Declarations must be against interest.	119c. Statements of predecessor against interest, when evidence in behalf of successor.
119. The interest of the declarant.	
119a. The death of the declarant.	

§ 117. **Declarations of third persons and other declarations distinguished.**—The declarations of third persons who are neither parties to the suit nor in privity with the parties constitute another exception to the rule rejecting hearsay evidence. To render such declarations admissible and to permit the production of the declarant as a witness to be dispensed with three elements must concur. In the first place it must be shown affirmatively that the declarant cannot be produced because he is dead, for declarations of this description are not only hearsay but are secondary evidence as well.

As in the case of declarations constituting evidence of reputation, it must also be shown that the person possessed adequate knowledge or was in such a situation that the possession of adequate knowledge may be presumed from the circumstances. And finally the declarations must have been against his interest when they were made.

It may be of value to distinguish declarations which are admissible on the ground just described from those which are receivable as evidence of reputation and pedigree or as a part of the *res gestæ*, on the one hand, and from those which are receivable because they are admissions, on the other.

The principal basis for the reception of admissions is the strong presumption of their truth, arising from the fact that they are declarations against interest, made by a party to the suit or by some one in privity with him. The declarations which are under consideration in this chapter resemble ad-

missions in that they are against interest, but they differ from admissions in that they are admissible not because against the interest of parties to the suit or persons in privity with them, but because they are against the interest of strangers, *i. e.*, third persons who had no interest in the present subject-matter and who are not identified in any way with those who are parties or privies to it. The persons who have made these declarations must have been possessed of adequate knowledge and must be deceased at the time of the suit, the declarations in these respects resembling pedigree,¹ while in the case of admissions, no such requirements exist, though on the other hand a joint interest or identity of interest must be shown prior to the admission of the latter.

The declarations of third parties against interest need not, though they often do, constitute a part of the *res gestæ* which is in litigation, nor need they be such entries as are made in the course of official or private duty, though it usually happens that they often possess such characteristics in common with the others which render them admissible.

The declarations of third persons against interest usually consist of written entries made in books of record or account, and from the circumstances of the case it frequently happens that such books, aside from any question of competency, are provable under the rules laid down with respect to ancient documents. But in most of the cases these book-entries against interest are wholly or partly admissible on other grounds, *i. e.*, as constituting a part of the *res gestæ* and as made in the course of the performance of private or professional duty.

§ 118. Declarations must be against interest.—In the first place the declarations must have been against the interest of the third person at the time they were made.² Self-interest prompts all persons to exercise a certain degree of care and attention in the conduct of their own affairs and to acquire a more or less intimate knowledge of what concerns themselves. Based upon these considerations, a strong probability exists that such declarations are true, while, on the other hand, the

¹ See § 53.

Hosford v. Rowe, 41 Minn. 247; Bla-

² Briberg v. Donovan, 23 Ill. App. Rock v. Miland, 87 Ga. 573.

62; Bartlett v. Patton, 33 W. Va. 71;

necessity of the case requires their admission, as the only persons who have perhaps the amplest knowledge are long since deceased.¹

The question has been raised whether the declaration is receivable as evidence of all the facts which are contained in it or only as evidence of those facts by virtue of which it is opposed to the pecuniary interest of the person making it. Though controverted by the earlier cases, it is now the rule that the whole declaration or entry may be given in evidence to show statements independent of and collateral to the main assertion. So the written receipt of a deceased person is admissible not only to show that the payment was made, which is the fact against his interest, but to show also the time or place of payment and the person for whose account the money was paid.² But statements of facts collateral to the fact which constitutes the entry a declaration against interest are not receivable unless connected with it by reference or by necessity in order to explain it. The mere fact that they were contemporaneously made does not render them admissible.³

§ 119. The interest of the declarant.—The declaration must have been opposed to the pecuniary or proprietary interest of the person making it,⁴ and the adverse interest should be shown by independent evidence or be inferable from the circumstances of the case itself.⁵

A declaration is opposed to a person's interest if a part only

¹ Bird v. Hueston, 10 Ohio St. 418.

² Lamar v. Pearse (Ga., 1893), 17 S. E. Rep. 92; Davie v. Humphreys, 6 M. & W. 153; In re Gracie's Estate (Pa., 1893), 27 Atl. Rep. 1083; Marks v. Lahee, 3 Bing. N. C. 408. Cf. Edward v. Cook, 4 Esp. 49.

³ Livingston v. Arnoux, 56 N. Y. 507. Cf. Malone v. Gates, 66 Tex. 22, which was an action to recover for the value of a quantity of timber. The party who measured the timber being dead, it was held proper to admit all his declarations as to the manner in which he made the scale or measure used by him.

⁴ Davis v. Lloyd, 1 C. & K. 276; Bartlett v. Patton, 33 W. Va. 71. Cf. Thistlethwait v. Thistlethwait, 13 Ind. 355.

⁵ Lamar v. Pearse (Ga., 1893), 17 S. E. Rep. 92; Higham v. Ridgway, 10 East, 109; Ivatt v. Finch, 1 Taunt. 141; In re Gracie's Estate (Pa., 1893), 27 Atl. Rep. 1083. Though the declarant may be deceased, and though he may have had competent knowledge, his declarations not constituting part of the *res gestæ* are inadmissible if not against his interest. Blalock v. Miland, 87 Ga. 573.

charges him with a liability, or where other portions of the book or document in which it occurs may discharge him from liability in whole or in part.¹ So a declaration in the form of a book entry is admissible where it is the only evidence of the charge, and even where the same book shows a counterbalancing or overbalancing entry, so that upon the whole the declaration or entry does not charge the party and is not against his interest.²

§ 119a. Death of the declarant.—To render declarations of third persons against interest admissible against the parties it must be shown that the declarant is deceased;³ and it has also been held in such a case that the deceased person must have been competent to testify as to the declaration against his interest if he had been alive at the date of the suit.⁴ The earlier decisions, however, support the contrary rule, that the incompetency of the declarant as a witness, if living, is immaterial, basing their reasoning upon the fact that, as the declaration is in its nature an admission or confession, it is very probably true,⁵ despite the disqualification of the person from testifying because of interest.

§ 119b. Knowledge of the declarant.—These declarations of deceased persons against their interest, while differing in some respects from declarations or entries made in the usual course of employment, resemble them in this: that they must have been made by a person who had a good knowledge of the facts or whose duty and interest it was to have that knowledge.⁶ If the stranger was possessed of competent knowledge of the transaction, it is immaterial that the entry does not show that it was made on his personal knowledge.⁷

¹ Stephen's Dig., art. 28.

² 1 Greenl. on Evid., § 151; Higham v. Ridgway, 10 East, 109; Rowe v. Brenton, 3 Man. & R. 267.

³ Bartlett v. Patton, 10 S. E. Rep. 4; 33 W. Va. 71; Hosford v. Hosford, 41 Minn. 245; 42 N. W. Rep. 1018; Linney v. Wood, 66 Tex. 22. In Griffith v. State (Tex., 1890), 14 S. W. Rep. 230, it was held that declarations which are admissible because the declarant is deceased are also admissible where he is so physically or mentally incapacitated that he is un-

able to testify in court or to have his deposition taken.

⁴ Heidenheimer v. Johnston, 76 Tex. 200; 13 S. W. Rep. 46.

⁵ 1 Greenl. on Evidence, § 153, citing Doe v. Robson, 15 East, 32; Middleton v. Melton, 10 B. & C. 317; Schenck v. Warner, 37 Barb. 258.

⁶ Clapp v. Engledow, 72 Tex. 252; 10 S. W. Rep. 252; Friberg v. Donovan, 20 Ill. App. 62.

⁷ 1 Greenl. on Evid., § 153, citing Crease v. Barrett, 1 Cr., M. & R. 219.

Entries made in the performance of professional or private duty, such as, for example, indorsements of service or the returns made on writs by the officials or private persons serving them, are receivable against the parties to a suit, partly because of the implied agency which exists between the party against whom they are introduced and the declarant, but mainly because the entries form a part of the *res gestæ*, *i. e.*, the fact of service. Such entries, however, are only available as evidence so far as they consist of statements of fact which it was the duty of the person to record, while the entry of a stranger against his interest is evidence of all facts contained in it which were actually recorded.

§ 119c. Statements of predecessor against interest, when evidence in behalf of successor.—The statements of a deceased owner of property in his own favor are never admissible evidence in behalf of those claiming the property by virtue of a title derived from him,¹ except where they are a part of the *res gestæ* already in evidence,² or have been acquiesced in by the adverse party or by one in privity with him.³ Neither are statements *against interest* made by a predecessor in estate admissible as evidence for his successor after his decease.⁴

In England one exception was made to the rule that no proprietor can make evidence in favor of his successor in interest. From the very earliest times the book entries of a deceased rector or vicar were received as evidence *for or against his successor*, but only to show the receipt of tithes or other money due the church, or similar entries against the interest of the party who made them and which from this circumstance were presumed to be true.⁵

¹ Reese v. Murnane, 31 Pac. Rep. 1027; 5 Wash. St. 372; In re Smith, 95 N. Y. 517; Schmidt v. Packard, 31 N. E. Rep. 944; 132 Ind. 398; Blalock v. Miland, 87 Ga. 573.

² See *ante*, § 115, "Boundaries."

³ See § 79.

⁴ Outram v. Morewood, 5 T. R. 123.

But in White v. Chouteau, 10 Barb. 202, the declaration of the owner of the goods against interest was received in favor of a surety claiming under him as against the principal debtor.

⁵ 1 Greenl. on Evid., § 155, citing Short v. Lee, 2 Jac. & W. 477.

CHAPTER XI.

WITNESSES ABSENT OR DISQUALIFIED.

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| <p>§ 120. Testimony of missing witnesses.</p> <p>121. Witness need not be deceased.</p> <p>122. Witnesses who have become sick, decrepit or insane.</p> | <p>§ 123. Cross-examination at former trial requisite — Identity of parties.</p> <p>124. Precise language of witness, how far necessary.</p> |
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§ 120. Testimony of missing witnesses.—The main grounds for the rejection of hearsay evidence are the absence of an oath and of an opportunity to cross-examine the person who is the informant of the witness. But if a witness who has given testimony in a judicial proceeding cannot be produced at a subsequent trial between the same parties for the same cause of action, there can be no objection on this ground to receiving his sworn testimony in the former trial.¹

§ 121. Witness need not be deceased.—It was at one time doubted whether the testimony of a witness in a former proceeding would be admitted in his absence from a later trial in case it was not shown that he was dead. So where the witness had become incompetent merely,² or interested³ in

¹ *Ruch v. Rock Island*, 97 U. S. 693; *Gastrell v. Phillips*, 64 Miss. 474; *Costen v. McDowell*, 107 N. C. 546; *Berg v. McLafferty*, 12 Atl. Rep. 460; *Lohman v. Stocke*, 94 Mo. 672; *Marshall v. Hancock*, 80 Cal. 82; *Lewis v. Roulo*, 93 Mich. 475; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513; *Reynolds v. United States*, 98 U. S. 155; *Bank of Monroe v. Gifford*, 79 Iowa, 300; *Costigan v. Lunt*, 127 Mass. 355; *Yale v. Comstock*, 112 id. 267; *Williams v. Willard*, 23 Vt. 369; *Barker v. Hebbard*, 81 Mich. 627; *Kendrick v. State*, 10 Humph. 479; *Harrison v. Charlton*, 42 Iowa, 573. But the evidence, if irrelevant, will not be ad-

mitted on the second trial, though, inadvertently, its incompetency was not recognized and it was not objected to at the earlier trial. *Petrie v. Railway Co.* (S. C., 1890), 7 S. E. Rep. 815. The testimony of one of defendant's witnesses in the former trial who is absent at the second trial may be used by the plaintiff in his own favor (*Hudson v. Roos*, 76 Mich. 173; *Stayner v. Joyce*, 22 N. E. Rep. 1889), and, if he is present as a witness, to impeach his credibility. *Johnson v. Clements*, 25 Kan. 376; *Nuzum v. State*, 88 Ind. 599.

² *Lee, Adm'r, v. Hill*, 87 Va. 497.

³ *Chess v. Chess*, 17 S. & R. 409.

the subject of litigation, or where he was out of the state,¹ or, being found, had wholly forgotten the facts of the case,² his testimony given at a former trial has been held inadmissible. But the weight of the modern cases sustains the more liberal and reasonable rule by which the testimony of an absent witness is admitted not only in case of his death but where he has become incompetent by insanity, imbecility or sickness.³

The testimony of a non-resident witness or of one who is merely temporarily out of the jurisdiction⁴ given at a former trial, it is now well settled in England and in many of the states, is admissible in a subsequent trial of the same issue.⁵ And if the witness is within the jurisdiction but is kept concealed by the other party, so that it is impossible to serve him with a subpoena, the court may, in its discretion, admit evidence of his testimony given at the prior trial.⁶ This proposition, however, is denied by many of the cases if the witness is not shown to be dead; and *a fortiori* where the residence of the absentee from the jurisdiction is known and his deposition can be procured, it has been held elsewhere that his former testimony was inadmissible,⁷ and that his deposition must be procured. In criminal cases, though this sort of evidence is

¹ Wilber v. Selden, 6 Cowen (N. Y.), 162; Rosenfeld v. Case, 87 Mich. 295; Finn's Case, 5 Rand. (Va.) 701.

² Stein v. Swenson, 46 Minn. 360; Dayton v. Wells, 1 Nott & McC. (S. C.) 409.

³ Hudson v. Roos, 76 Mich. 180; Reynolds v. United States, 98 U. S. 155. In New York the testimony of a deceased witness only can be read in evidence in a subsequent trial. Crary v. Sprague, 12 Wend. 41; Wilber v. Selden, 6 Cow. 162; Mut. Life Ins. Co. v. Anthony, 50 Hun, 101.

⁴ "Out of the jurisdiction" signifies out of the reach of a subpoena. Meyer v. Roth, 51 Cal. 582.

⁵ Omaha v. Jensen (Neb., 1892), 52 N. W. Rep. 833; Minn. M. Co. v. Minn. etc. Ry. Co., 53 N. W. Rep. 639; Gunn v. Wade, 65 Ga. 537; Dolan v. State, 40 Ark. 454; Pruitt

v. State, 92 Ala. 41; Hudson v. Roos, 76 Mich. 180; Marler v. State, 67 Ala. 55; Howard v. Patrick, 38 Mich. 795; Rothrock v. Gallaher, 91 Pa. St. 108; Rosenfeld's Case, 87 Mich. 295; Whitaker v. Marsh, 62 N. H. 478; People v. Devine, 46 Cal. 225.

⁶ Reynolds v. United States, 98 U. S. 155; Cook v. Stout, 47 Ill. 530; Williams v. State, 19 Ga. 402.

⁷ See *post*, § 359 et seq.; Gastrell v. Phillips, 64 Miss. 473; Savannah, etc. Co. v. Flanagan, 82 Ga. 579; Rosenfeld's Case, 87 Mich. 295; Sullivan v. State, 6 Tex. App. 319; Slusser v. Burlington, 47 Iowa, 300; Stein v. Swenson, 46 Minn. 360; Collins v. Com., 12 Bush, 271; Kellogg v. Secord, 42 Mich. 318; Brogy v. Com., 10 Gratt. (Va.) 722; Gerhauser v. North Brit. etc. Co., 7 Nev. 175.

sometimes admitted, it should not be received until a diligent search has been made for the missing witness.¹

§ 122. Witnesses who have become sick, decrepit or insane.—The testimony of a witness at a former trial who has since become mentally incapacitated to testify by reason of insanity,² or who is confined to his house by illness or by physical disability³ arising from weakness or from the decrepitude of old age,⁴ may be given in a subsequent trial between the same parties of the same cause of action.

§ 123. Cross-examination at former trial requisite — Identity of parties.—In order that the testimony of a deceased or absent witness may be admissible against a party in a subsequent trial, it is absolutely essential that the party should have had a full opportunity at the earlier trial of cross-examining the witness.⁵ If an opportunity of cross-examina-

¹Shackelford v. State, 33 Ark. 539; N. W. Rep. 463; O'Brien v. Com., 6 Sullivan v. State, 6 Tex. App. 319; Bush (Ky.), 563; State v. Johnson, 12 Wilder v. St. Paul, 12 Minn. 106. Nev. 121; State v. O'Brien, 81 Iowa, 88; Marshall v. Hancock, 80 Cal. 82.

²Whitaker v. Marsh, 62 N. H. 477; 88; Marshall v. Hancock, 80 Cal. 82. The evidence of witnesses before arbitrators will be receivable in a subsequent trial in court of the same matter. Barley v. Woods, 17 N. H. 365; Jaccard v. Anderson, 37 Mo. 91; v. Criswell, 3 T. R. 721; State v. Laque, 41 La. Ann. 1070. Bishop v. Tucker, 4 Rich. (S. C.) 78; Osborn v. Bell, 5 Denio, 370; Orr v. Hadley, 36 N. H. 575. In the trial of an indictment for murder the testimony taken at the coroner's inquest held to investigate the death of the deceased is not admissible where the witness cannot be produced (State v. Campbell, 1 Rich. (S. C.) 124; Farkas v. State, 60 Miss. 847; Whitehurst v. Com., 79 Va. 556; State v. Cecil, 54 Md. 426; McLain v. Com., 99 Pa. St. 86; Dupree v. State, 33 Ala. 380; State v. McNeil, 33 La. Ann. 1332), though in one case it was admitted in behalf of defendant. So the testimony of a witness at a coroner's inquest is not admissible in a subsequent action to recover for the wrongful death, though the witness is dead. Pittsburg, etc. Co. v. McGrath, 115

³Perrin v. Wells, 155 Pa. St. 299; Miller v. Russell, 7 Mart. (N. S.) 266; State v. King, 86 N. C. 603. If it seems likely that the witness will shortly recover from his illness the court may, it has been held, adjourn the trial. Harrison v. Blades, 3 Campb. 458.

⁴Evidence given on a former trial cannot be produced on a second trial without calling the witness, upon the ground that he has forgotten particular facts, unless his failure to remember is the result of mental imbecility. Stein v. Swenson, 46 Minn. 360; 49 N. W. Rep. 55. See Thornton v. Britton, 144 Pa. St. 126, as to testimony of aged witness.

⁵Bradley v. Merrick, 91 N. Y. 293; Hudson v. Applegate (Iowa, 1893), 54

tion has been afforded the party against whom the testimony of the absent witness is subsequently put in evidence, it is not always necessary that the parties to the several actions should be precisely identical or that the issue should be the same on both occasions.¹ Thus, if the second proceeding is between those in privity with the parties to the earlier trial, the testimony of a witness in the trial between the original parties is admissible against those in privity with them, though the subject-matter of the later litigation is not identical with that of the earlier.² But though exact identity of subject-matter is not generally required, yet the issue in the second proceeding must have been so far identified and connected with the subject of the former litigation that the party against whom the evidence is introduced must have had a right, according to the rules of evidence, to cross-examine. In other words, it is required that the evidence should not be incidental, but that it should be equally relevant to the issues in both trials.³ It is requisite that in the former trial the court should have had jurisdiction, and if the proceeding were substantially regular the testimony will not be rejected subsequently on account of informalities.⁴

Ill. 172. The constitutional right of the accused to meet the witnesses face to face is not violated by the admission of the testimony of an absent witness taken on a former trial where he had an opportunity to cross-examine the witness. *Com. v. Richards*, 18 Pick. (Mass.) 434; *State v. Blemis*, 24 Mo. 402. An opportunity to cross-examine is not shown by evidence that counsel in the pending action was present at the previous proceeding. *Jackson v. Crilly*, 16 Colo. 103.

¹ *Jackson v. Crilly*, 16 Colo. 103; *Mathews v. Colburn*, 1 Strobb. 258; *Jackson v. Lawson*, 15 Johns. 544; *Schindler v. Railroad Co.*, 87 Mich. 400; *Philadelphia, etc. Co. v. Howard*, 13 How. (U. S.) 307; *Hunter v. Burlington, etc. Co.*, 76 Iowa, 490;

Goodlett v. Kelly, 74 Ala. 213; *Charlesworth v. Tinker*, 18 Wis. 633.

² *Lee's Adm'r v. Hill*, 12 S. E. Rep. 1052; 87 Va. 497; *Shelton v. Barbour*, 2 Wash. 64; *Seattle, etc. Co. v. Gilchrist*, 4 Wash. St. 509; *Yale v. Comstock*, 112 Mass. 267; *Fisher v. Monroe*, 2 Misc. Rep. 326; *Indianapolis, etc. Co. v. Stout*, 53 Ind. 548; *Schindler v. Milwaukee, etc. Co.*, 49 N. W. Rep. 670; 87 Mich. 400; *Jackson v. Crissey*, 3 Wend. (N. Y.) 251; *Strickland v. Hudson*, 55 Miss. 235.

³ *Jackson v. Winchester*, 4 Dall. 206; *Melvin v. Whiting*, 7 Pick. 79. Cf. *Stayner v. Joyce*, 22 N. E. Rep. 89; *Schindler v. Milwaukee, etc. Co.*, 87 Mich. 400.

⁴ *State v. Johnson*, 12 Nev. 121. So where on the earlier trial the witness was not sworn by consent. *Wheeler v. Walker*, 12 Vt. 427.

§ 124. **Precise language, how far requisite.**— Formerly it was considered essential that the person who testified to the evidence of an absent witness should state the exact language of the witness.¹ This rule, however, was soon relaxed, and it is now the law that the exact language need not be given if its substance is accurately stated in the later trial.² But the whole of the testimony of the witness upon a particular point should be repeated in language as nearly identical as possible, so that the effect produced may correspond with the impression made upon the jury by the testimony of the witness in the original trial.³ Accordingly, the testimony of the witness elicited on his cross-examination must be substantially repeated.⁴

At the present time the custom of employing a court stenographer, whose duty it is to take down the testimony of the witnesses examined, is nearly universal. He is usually a sworn officer of the court, and his notes or transcripts of them possess an official character and authenticity which render them of great value in case of the subsequent death or absence of a witness.⁵ Where such records exist, their production on

¹ 1 Greenl. on Evid., § 165; Wilber v. Selden, 6 Cow. 165; Montgomery v. State, 11 Ohio, 421; United States v. Wood, 3 Wash. 440; Foster v. Shaw, 7 S. & R. 163; Com. v. Richards, 18 Pick. 464.

² State v. O'Brien, 81 Iowa, 88; 46 N. W. Rep. 752; Bennett v. State, 22 S. W. Rep. 284; Buie v. Carver, 73 N. C. 264; Wade v. State, 7 Baxt. (Tenn.) 80; Gannon v. Stevens, 13 Kan. 447; Brown v. Com., 73 Pa. St. 321; Stein v. Swenson, 46 Minn. 360; Johnson v. Powers, 40 Vt. 611; Mitchell v. State, 71 Ga. 128; Horne v. Williams, 23 Ind. 37; Smith v. Natchez S. Co., 1 How. (Miss.) 479; Lathrop v. Atkinson, 81 Ga. 339; Martin v. Cope, 3 Abb. Dec. 182; Young v. Dearborn, 22 N. H. 372; Emery v. Fowler, 39 Me. 326; Lime R. Bank v. Hewett, 52 id. 531; Caton v. Lenox, 5 Rand. (Va.) 31.

³ Bennett v. State, 22 S. W. Rep. 684.

⁴ Wade v. State, 7 Baxt. 80; Gildersleeve v. Caraway, 10 Ala. 260; Block v. Woodron, 39 Md. 194; Wolf v. Wyeth, 11 S. & R. 149; Woods v. Keys, 14 Allen, 236; Puryear v. State, 63 Ga. 692; Marsh v. Jones, 21 Vt. 378; State v. O'Brien, 81 Iowa, 88; Hepler v. Mt. Carm. Sav. Bank, 97 Pa. St. 420; Black v. Woodson, 39 Md. 194; Tibbetts v. Flanders, 18 N. H. 284; Wright v. Stowe, 4 Jones' L. (N. C.) 516. The objection that the witness fails to remember the cross-examination is waived if not made immediately. State v. O'Brien, 81 Iowa, 88; 46 N. W. Rep. 752.

⁵ That a stenographer's notes are competent, see District v. Wash. Gas Co., 20 D. C. 39; Hicks v. Lovell, 64 Cal. 14; Quinn v. Halbert, 57 Vt. 178; Labor v. Crane, 56 Mich. 585; John-

the subsequent trial should, it seems, be required under the rule requiring the production of the best evidence. But the verbal testimony of the stenographer, it has been held, in such a case, given after refreshing his memory by a perusal of his notes, is admissible,¹ provided the notes are shown to the opposite party and he is given an opportunity to cross-examine the witness as to their accuracy.² A stenographer's notes taken out of the jurisdiction,³ or taken down from the lips of an interpreter where the witness testifies in a foreign language,⁴ or when the reporter is dead,⁵ or when for any reason the notes are not shown to be correct,⁶ have been held inadmissible to prove the testimony which a witness gave at a former trial. The judge's notes also are not competent to show what the witness said until it is shown that they contain an accurate and complete account of the substance of the witness' language.⁷ Their incompetency is due to the fact that they are no part of the record and are not made within the scope of official duty or under the sanction of an official oath, which would guaranty that they are complete or correct.⁸ So when it is sought to show, by the bill of exceptions, or a case on appeal, the testimony of a witness at a former trial, a foundation must be laid by proving that the bill does actually contain all the evidence given by the witness.⁹ When, however, the record is not obtainable,

son v. Spear, 82 Mich. 453; Sage v. State, 27 Ind. 15; 26 N. E. Rep. 667.

¹ Rounds v. State, 57 Wis. 45; People v. Chung, 57 Cal. 567; Hicks v. Lovell, 64 Cal. 14; Shackelford v. State, 33 Ark. 559; Moore v. Moore, 39 Iowa, 461.

² People v. Lon You (Cal., 1893), 32 Pac. Rep. 11.

³ Herrick v. Swomley, 56 Md. 439.

⁴ People v. Ah Yute, 56 Cal. 119.

⁵ Trunkey v. Hedstrom, 33 Ill. App. 397.

⁶ People v. Sligh, 48 Mich. 54.

⁷ Simmons v. Spratt, 1 S. Rep. 860; Thompson v. Richardson (Ala., 1893), 11 S. Rep. 728; Wade v. State, 7 Baxt. (Tenn.) 80; Elberfeldt v. Waite, 79 Wis. 284.

⁸ Elberfeldt v. Waite, 79 Wis. 284; Ex parte Learmouth, 6 Madd. 113; Regina v. Child, 5 Cox C. C. 197; Schafer v. Schafer, 93 Ind. 586; Miles v. O'Hara, 4 Binn. (Pa.) 108; Huff v. Bennett, 4 Sandf. (N. Y.) 120; Sergeant v. Marshall, 38 Ill. App. 642.

⁹ Woolen v. Wire, 110 Ind. 251; Case v. Blood, 71 Iowa, 632; Slingerland v. Slingerland, 46 Minn. 100; Davis v. Kline, 9 S. W. Rep. 724; Odell v. Solomon, 4 N. Y. S. 440; Dwyer v. Rippetoe, 72 Tex. 520; Coughlin v. Haensler, 50 Mo. 126; St. Joseph v. Union Ry. Co. (Mo., 1893), 22 S. W. Rep. 794; Fisher v. Fisher, 131 Ind. 462. Cf. Elgin v. Welch, 23 Ill. App. 185.

any person who has heard the witness, as, for example, the counsel of one of the parties or a juror,¹ a justice,² master in chancery,³ committing magistrate,⁴ interpreter⁵ or newspaper correspondent⁶ will be allowed to testify to the language of an absent witness from notes taken on the former trial.⁷ In case counsel in the subsequent trial enter into a stipulation by which they agree upon the admissibility of the witnesses' notes, a verification or identification under oath may be dispensed with.⁸ But such a stipulation does not make the testimony taken in the prior case evidence unless it is actually introduced as such.⁹

¹ *Hutchings v. Corgan*, 59 Ill. 70.

² *Elberfeldt v. Waite*, 79 Wis. 284;
48 N. W. Rep. 525; *Chase v. Debolt*,
7 Ill. 571.

³ *Yale v. Comstock*, 112 Mass. 267.

⁴ *Wade v. State*, 7 Baxt. (Tenn.) 80.

⁵ *People v. Ah Yute*, 56 Cal. 119.

⁶ *Moore v. Moore*, 39 Iowa, 461.

⁷ *Carpenter v. Tucker*, 98 N. C. 316;
Loughry v. Wait, 34 Ill. App. 523;

Davis v. Kline (Mo., 1888), 9 S. W.
Rep. 724; *People v. Murphy*, 45 Cal.
137; *Ruch v. Rock Island*, 97 U. S.
693.

⁸ *Nutt v. Thompson*, 69 N. C. 548;
Clark v. Vance, 15 Wend. 193; *Lath-
rop v. Adkinson*, 87 Ga. 389.

⁹ *Pitts v. Lewis*, 81 Iowa, 51; 46 N.
W. Rep. 739; *United States Exp. Co.
v. Jenkins*, 73 Wis. 471.

CHAPTER XII.

PRIVATE WRITINGS.

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| <p>§ 125. Definition and classification.</p> <p>126. Production of writing—Proof of contents by secondary evidence.</p> <p>127. Writings obtained by fraud or deceit — Decoy letters.</p> <p>128. Spoliation and alteration distinguished — Effect of material alterations.</p> <p>129. Alterations — Presumptions and burden of proof to explain.</p> <p>130. Private writings lost or destroyed.</p> <p>131. Handwriting defined.</p> <p>132. Production of writings, when necessary.</p> <p>133. Proof by admissions of party.</p> | <p>§ 134. When proof of handwriting may be dispensed with—Acknowledgments.</p> <p>135. Who may take acknowledgments.</p> <p>136. The certificate.</p> <p>137. Impeaching the certificate.</p> <p>138. Proof by subscribing witnesses.</p> <p>139. Proof by witnesses acquainted with party's handwriting.</p> <p>139a. Mode of examining witnesses as to handwriting.</p> <p>140. Comparison of handwriting.</p> <p>141. To what expert may give evidence.</p> <p>142. Proof of exhibits in equity.</p> |
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§ 125. Definition and classification.—“The word ‘writing’ in its broadest sense means words traced with a pen, or stamped, printed or engraved, or made legible by any other device.”¹ Writings are divided into two classes — public and private. A public writing may be defined as the written act or record of the business of the people of the community proceeding from the supreme executive, legislative or judicial authority either of the federal government, of the government of a state or foreign country, or of some public officer, court or official body created by law and deriving their powers from that government, including also all official records of private writings.

Public writings are subdivided into four classes, viz.: *Public laws; judicial records; records kept by public officials in*

¹ Anderson's Dict.; Henshaw v. Foster, 9 Pick. 318. A printed ticket is a “writing” and may be forged at common law. Benson v. McMahon, 127 U. S. 467.

pursuance of statute or as a part of their official duty, and *public records of private writings*.¹

All writings not comprised in any of these classes, and which concern the affairs of one or more individuals only, are private.² The words "document" and "writing" approximate closely in meaning and may be and are often used interchangeably with correctness. The word "instrument" has perhaps a more restricted meaning; for while it is often used to describe any writing, its more proper meaning is a document or writing of a formal or deliberate character which is intended to be used as a means of judicial evidence. Thus under the words "instrument" or "written instrument" would properly be included bonds, conveyances, wills and other formal or solemn instruments; while on the other hand, letters, accounts, memoranda and the like, the creation of which was not primarily intended to create a binding obligation or title, could not in strictness of language be called instruments.³

§ 126. Production of writings — Proof of contents by secondary evidence.— In the absence of statute the production of private writings may be secured either by a bill of discovery in chancery or by a subpoena *duces tecum*.⁴ By federal statutes and by statutes regulating practice in the states which have adopted the reformed procedure it is now permitted for the court, after notice to the other party and upon motion, to grant an order for the discovery and production of books and papers in his hands or to compel him to grant an inspection of them and permission to take copies thereof.

The party compelled to produce papers is allowed a reasonable time to do so, but if he fails to comply with the order, the court may in its discretion order that the action to which the document is relevant be dismissed or his pleading be stricken out and judgment be rendered accordingly. The court may also direct that the writing shall not be admitted in evidence in favor of the party refusing to produce and may punish him

¹ Abbott's Dig., vol. 3, title "Evidence." See, also, *McCall v. United States*, 1 Dak. 321-328.

² Anderson's Law Dict., "Documents."

³ Abbott's Law Dict.; *Hankinson v. Page*, 3 Fed. Rep. 186; *State v. Kelsey*, 44 N. J. Law, 34.

⁴ See *post*, § 279.

for contempt, or both.¹ These statutes² have superseded the necessity of a notice to produce; but where they do not obtain, the common-law notice to produce is still employed, irrespective of the fact that in consequence of the statutory competency of the party as a witness the production of the papers may be secured by a subpoena *duces tecum*.³

At common law, in order to lay a foundation for the introduction of secondary evidence of a writing where the adverse party has refused to produce it, it is necessary to prove the existence of the writing to the satisfaction of the court,⁴ and that it is in the possession or control of the adverse party,⁵ though if the writing is in the possession of another in privity with him, notice to the latter is sufficient.⁶ The notice to produce may be verbal,⁷ but must describe the writing required with reasonable precision.⁸ A notice to produce a letter will require the production of its envelope,⁹ and should be seasonably served on the party or his attorney¹⁰ before the commencement of the trial.¹¹ Where the writing is collateral to the issue,¹² or if an adverse party has by force or fraud obtained possession of the papers,¹³ or attempts to give secondary evidence of their contents,¹⁴ or offers to produce them,¹⁵

¹ N. Y. Code Civ. P., 803-809. See, also, *Traverse v. Satterlee*, 67 Hun, 652; 22 N. Y. S. 118; *Schwartz v. Atkin*, 12 Pa. Co. Ct. Rep. 373; *Simon v. Ash*, 1 Tex. Civ. App. 202; 20 S. W. Rep. 719; *Gould v. McCarty*, 1 Kernan, 575; *Sanchez v. Dickinson*, 19 N. Y. S. 733.

² See *Marrone v. N. Y. Jockey Club*, 14 N. Y. S. 199; *Bridgman v. Scott*, 13 id. 338; 59 Hun, 624; *Frowein v. Lindheim*, 11 N. Y. S. 495; *Wahed El Tazi v. Stein*, 59 Hun, 622; *Rigdon v. Conley*, 31 Ill. App. 630.

³ *Rigdon v. Conley*, *supra*; *Roberts v. Dixon*, 50 Kan. 436; *Spiers v. Wilson*, 4 Cranch, 398; *Homeyer v. N. J. S. & W. Co.*, 66 Hun, 626; *Doon v. Donaher*, 113 Mass. 151; *Vinal v. Burrill*, 16 Pick. 401, 407; *Northrup v. Jackson*, 13 Wend. 86; *Pangburn v. Insurance Co.*, 62 Mich. 638.

⁴ *Sharpe v. Lamb*, 3 P. & D. 454.

⁵ *Dix v. Atkins*, 128 Mass. 43; *Roberts v. Spencer*, 123 id. 397; *Henry v. Leigh*, 3 Camp. 499, 502.

⁶ *Sinclair v. Stevenson*, 1 C. & P. 582.

⁷ *Brokman v. Myers*, 59 Hun, 623.

⁸ *Austine v. Treat* (Mich., 1888), 39 N. W. Rep. 749.

⁹ *United States v. Duff*, 19 Blatchf. 10.

¹⁰ *Pitts v. Emmons*, 92 Mich. 542; *Glenn v. Rogers*, 3 Md. 312; *Holt v. Miers*, 9 C. & P. 191; *Reg. v. Kitson*, 20 Eng. L. & Eq. 509.

¹¹ *Chattues v. Raitt*, 20 Ohio, 132; *Sturm v. Jeffers*, 2 C. & K. 442; *Emerson v. Fisk*, 6 Greenl. 200; *Hughes v. Budd*, 8 Dowl. 315.

¹² *Coonrod v. Madden*, 126 Ind. 197.

¹³ *Doe v. Ries*, 7 Bing. 724; *Neally v. Greenough*, 5 Foster (N. H.), 325.

¹⁴ *Bartholomew v. Stephens*, 8 C. & P. 728.

¹⁵ *Dwinell v. Larrabee*, 38 Me. 464.

notice to produce is not necessary in order to lay a foundation for secondary evidence.¹ But writings which have been produced upon notice are not thereby made evidence unless the party demanding their production so inspects them as to become acquainted with their contents. If he does examine them, to that extent they are, according to some of the decisions, evidence for both parties to the cause.²

If the fact of a demand and refusal to produce be left in doubt, or if the existence of and the search for the writing are not shown, secondary evidence of the contents of the instrument will not be received.³ The sufficiency of the proof that the instrument cannot be produced by the party desirous of proving its contents by secondary evidence is for the judge,⁴ and his decision will not be reviewed unless it is based upon an error of law.⁵

§ 127. Writings obtained by fraud or deceit — Decoy letters.— The fact that documentary evidence has been obtained illegitimately or irregularly, or secured by the practice of deceit upon a person against whom they are introduced, will not, if it is in other respects admissible, cause its rejection.⁶ So documentary evidence obtained by the use of decoy letters is admissible very often from the necessity of the case in the prosecution of a person indicted for mailing obscene articles,

¹ Greenl. on Evid., § 561. Cf. *Bourne v. Boston*, 2 Gray, 494; *Blanchard v. Young*, 11 Cush. 341, 345. *berg*, 27 Mo. App. 285; *Stratton v. Hawks*, 43 Kan. 541; *Carr v. Miller*, 42 Ill. 179; *Walker v. School Dist.*, 22 Conn. 326.

² *Calvert v. Flower*, 7 C. & P. 386; *Long v. Drew*, 114 Mass. 77; *Clark v. Fletcher*, 1 Allen, 53. *Contra*, *Blake v. Russ*, 33 Me. 360; *Austin v. Thompson*, 45 N. H. 113. Marking paper as an exhibit does not necessarily make a writing evidence. *Castell v. Millison*, 41 Ill. App. 61. See *post*, § 142.

³ *Nolan v. Pelham*, 77 Ga. 262; *Hanover F. I. Co. v. Lewis*, 23 Fla. 193; 1 S. Rep. 863.

⁴ *Milford v. Veazie* (Me., 1888), 14 Atl. Rep. 730; *Smith v. Brown*, 151 Mass. 339; *United States v. Sutton*, 21 How. 170, 175; *Lindauer v. Mey-*

⁵ *Smith v. Brown* (Mass., 1890), 24 N. E. Rep. 31; *Bonds v. Smith*, 106 N. C. 553; *Gorgas v. Hertz*, 150 Pa. St. 538; *Bain v. Welsh*, 85 Me. 108.

⁶ 1 Greenl. on Evid., § 254a, citing *Com. v. Dana*, 2 Met. 327, 329; *Legatt v. Tollervey*, 14 East, 202. "Where the guilty intent to commit crime has been formed, any one may furnish opportunities or even lend assistance to the criminal to expose him. But no court will countenance a violation of positive law or contrivances for inducing a person to commit a crime." *United States v. Whittier*, 5 Dill. 39, 45, by Treat, J.

for robbing the mails, or for a violation of the postal or revenue laws. The manner in which the evidence has been procured will not be inquired into by the court, nor should it be permitted to discredit its force in the mind of the jury.¹ In the case of an indictment for sending obscene literature through the mails, it is immaterial that the evidence against the accused consisted of certain writings sent to a detective under an assumed name.² But it is always necessary in prosecuting for a theft of mail matter that the decoy letter should have become a part thereof by deposit in the mail in some of the ways provided by the postoffice department.³

§ 128. Spoliation and alteration distinguished — Effect of material alterations.— The act of a stranger to the writing resulting in its alteration or mutilation does not change its legal effect if the writing remains legible and a trace of the seal can be seen where a seal is required.⁴ Accordingly the alteration or total destruction of a deed or other writing by a stranger has no other effect upon the rights of the party claiming under it than to compel the proof of its loss to allow the introduction of secondary evidence of its contents.⁵ But a distinction is made between a spoliation by a stranger, frequently done accidentally, and for which the innocent party cannot justly be called upon to suffer a loss, and the deliberate alteration of the writing. The word "alteration" as thus used does not refer to every cancellation, interlineation or

¹ *United States v. Slenker*, 32 Fed. Rep. 694; *Speiden v. State*, 3 Tex. App. 156; *Wright v. State*, 7 id. 574; *United States v. Rapp*, 30 Fed. Rep. 818; *Saunders v. People*, 38 Mich. 222; *United States v. Cuttingham*, 2 Blatchf. 470; *People v. Collins*, 53 Cal. 185; *State v. Jansen*, 22 Kan. 498; *People v. Noelke*, 94 N. Y. 137; *Commonwealth v. Cohen*, 127 Mass. 282.

² *United States v. Bott*, 11 Blatchf. 346; *Bates v. United States*, 10 Fed. Rep. 92, 97-100. *Contra*, *United States v. Whittier*, 5 Dill. 39-41.

³ *United States v. Rapp*, 30 Fed. Rep. 822.

⁴ *Greenl. Evid.*, § 566.

⁵ *Consaul v. Sheldon*, 35 Neb. 247; *In re Leigh* (1892), Prob. 82; *Cutts v. United States*, 1 Gall. 69; *Boyd v. McConnell*, 10 Humph. (Tenn.) 68; *United States v. Spalding*, 2 Mason, 478; *Boteler v. Dexter*, 20 D. C. 26; *Anthony v. Beal*, 111 Mo. 637; *Marshal v. Yougler*, 10 S. & R. 164; *Raper v. Birkbeck*, 15 East, 17; *Nichols v. Johnson*, 10 Conn. 193; *White Sew. M. Co. v. Dakin*, 86 Mich. 581; *Davis v. Shafer*, 50 Fed. Rep. 74; *Wylie v. Miss. Pac. R. Co.*, 41 Fed. Rep. 623.

erasure made in the instrument, but is confined to those by which the original legal significance of its language is changed; and usually to those changes only in which a fraudulent intent exists or may be implied from all the circumstances.¹ Where such an alteration is shown to have been made by a party, the decisions are unanimous in supporting the rule that the writing, whether under seal or not, is thereby made void, upon the manifestly just principle that no man shall be allowed to act fraudulently without assuming the risk of losing if his fraud is detected.² But mere memoranda made on a writing,³ or immaterial alterations by which the writing is not made to convey a different meaning in any essential respect, will not avoid it, provided they are innocently made. So where terms are inserted by a party which the law would supply, or which have no meaning, his act will not be a material alteration or vitiate the whole instrument.⁴ Where an alteration is fraudulently made it has been considered to be of no importance whether it is material, the presence of a fraudulent intent being deemed sufficient to avoid the writing.⁵

In the discussion of the alteration of writings the distinction between covenants and contracts which are executed and

¹ *Express Co. v. Aldine Press*, 126 Pa. St. 347; *King v. Rea*, 21 Pac. Rep. 1084; *Croswell v. Labree*, 81 Me. 44; *First Nat. Bank v. Carson*, 60 Mich. 432.

² *Wegner v. State*, 28 Tex. App. 419; *Hollingsworth v. Holbrook* (Iowa, 1890), 45 N. W. Rep. 561; *Palmer v. Poore*, 121 Ind. 135; *Flanigan v. Phelps*, 42 Minn. 186; *Sanders v. Bagwell* (S. C., 1893), 16 S. E. Rep. 770; *Bank v. Nickell*, 34 Mo. App. 295; *Wiseman v. Fleischer*, 10 Pa. Co. Ct. R. 300; *Magers v. Dunlap*, 39 Ill. App. 618; *Walton v. Campbell* (Neb., 1892), 52 N. W. Rep. 883; *Gordon v. Bank*, 144 U. S. 97; *Sherwood v. Merritt*, 83 Wis. 233; *Burnham v. Gosnell*, 47 Mo. App. 637; *Little Rock Trust Co. v. Martin*, 21 S. Rep. 468; *Croswell v. Labree*, 81 Me. 44; *Clapp v. Collins*,

7 N. Y. S. 98; *Bank v. Wolff*, 79 Cal. 69; *Burrows v. Klunk*, 70 Md. 451. The materiality of the alteration is a question for the court. *Pritchard v. Smith*, 77 Ga. 463; *McIntyre v. Velte*, 153 Pa. St. 350.

³ *Maness v. Henry* (Ala., 1893), 11 S. Rep. 470.

⁴ *Swigart v. Weare*, 37 Ill. App. 258; *Reed v. Kemp*, 16 Ill. 445; *Mach. Co. v. Barry*, 2 Misc. Rep. 264; *Hunt v. Adams*, 6 Mass. 519; *Smith v. Crooker*, 5 Mass. 538; *Fischer v. King*, 53 Pa. St. 3; *Knapp v. Maltby*, 13 Wend. 587; *Green v. Beckney*, 3 Ind. App. 39; *Bank v. Good*, 44 Mo. App. 129; *Brown v. Purkham*, 18 Pick. 172; *Magers v. Dunlap*, 39 Ill. App. 618.

⁵ 1 Greenl. on Evid., § 568. See cases *supra*; *Smith v. Dunbar*, 8 Pick. 246.

those which are executory merely should not be lost sight of.¹ Thus in the case of a deed the grantee does not hold his title by virtue of the existence of the deed, which is now only the written evidence of a past transaction, and after his estate is once vested he may alter or destroy the deed without destroying his title to the estate.² But the deed, where it has been materially altered by him with a fraudulent intent, is no longer evidence in his hands in any proceedings founded upon its covenants or agreements.³ Where the alteration is made before delivery,⁴ or after delivery with the consent of both parties,⁵ the validity of the instrument will not be affected. Where a power of attorney,⁶ deed⁷ or custodian's bond⁸ or an undertaking on appeal⁹ or similar instrument is intentionally executed in blank as to subject-matter, or amount or name of the party, and is subsequently filled in by one of the parties, the writing will be valid and will be admissible in evidence.¹⁰

¹ Gleason v. Hamilton, 138 N. Y. 353.

² If the alteration was made before record, where record is necessary to vest title in the grantee, the altered deed, when registered, will be inoperative and title will remain in the grantor. Respass v. Jones, 102 N. C. 5.

³ Woods v. Hilderbrand, 46 Mo. 284; Wallace v. Harmstead, 44 Pa. St. 493; Dana v. Newhall, 13 Mass. 498; Fletcher v. Memsur, 5 Ind. 267; Rifener v. Bowman, 53 Pa. St. 318; Bliss v. McIntire, 18 Vt. 466; Coit v. Starkweather, 8 Conn. 289; Com. v. Hanson, 1 Nott & McC. (S. C.) 554; 1 Greenl. on Evid., § 568; Hollis v. Harris (Ala., 1893), 10 S. Rep. 377; Jackson v. Gould, 7 Wend. 364; Russell v. Longmore, 29 Neb. 286; Arrison v. Harmstead, 2 Barr, 191; Hatch v. Hatch, 9 Mass. 307; McIntyre v. Velte, 153 Pa. St. 350; Whitmer v. Fry, 10 Mo. 348; Alkire v. Kahla, 123 Ill. 496. So it has been held that the grantee will not be permitted to prove the covenant by parol. Martindale v. Follet, 1 N. H. 95, and cases *supra*.

⁴ Stewart v. Preston, 1 Fla. 10; Boston v. Benson, 12 Cush. (Mass.) 61; Wright v. Wright, 7 N. J. L. 175; Campbell v. McArthur, 2 Hawks (N. C.), 33; Britton v. Stanley, 4 Whart. (Pa.) 114; Ravisies v. Alston, 5 Ala. 297.

⁵ Wooley v. Constant, 4 Johns. 54; Speake v. United States, 9 Cranch, 28; Smith v. Weed, 20 Wend. 184; Berry v. Haines, 4 Wheat. 17; Stiles v. Probst, 69 Ill. 382; Tompkins v. Corinth, 9 Cow. (N. Y.) 255; Jackson v. Johnson, 67 Ga. 187; Collins v. Collins, 51 Miss. 511; Bassett v. Bassett, 55 Me. 125.

⁶ Eggleton v. Gutteridge, 11 M. & W. 468.

⁷ Cribben v. Deal, 21 Oreg. 211.

⁸ Bank v. Kortright, 22 Wend. 348.

⁹ Ex parte Decker, 6 Cowen, 59.

¹⁰ Christian Co. Bank v. Good, 44 Mo. App. 129; Gordon v. Jeffery, 2 Leigh (Va.), 410; Gilbert v. Anthony, 1 Yerg. 69; Knapp v. Maltby, 13 Wend. 587; Plank-road Co. v. Wetsel, 21 Barb. 56; Shelton v. Dearing, 10 B. Mon. 405. See remarks of Mr. Jus-

If a person through inadvertence and negligently issues a negotiable instrument in which spaces or blanks are left, affording an opportunity for the insertion of words without exciting suspicion, and the note is altered, the writing will be evidence against the maker in the hands of a *bona fide* holder for value.¹

§ 129. Alterations — Presumptions and burden of proof to explain.— When an instrument offered shows alterations or interlineations on its face, it may justly be regarded with some suspicion and the party claiming under it should be compelled to account for its altered condition.² This he may do by slight evidence if upon examination the alteration is noted in the attestation clause as having been made prior to or contemporaneously with its execution, or if the alteration is against his interest.³ Whether any presumption exists as to the date of an unexplained alteration in a deed or similar writing the courts are divided. It has been held that, as fraud will not be presumed, an alteration in an instrument *inter vivos* will, in the absence of suspicious circumstances, be presumed to have been made before delivery.⁴ On the other hand, other decisions deny the existence of any presumption,⁵

tice Johnson in *Duncan v. Hughes*, 1 McCord, 239, 240.

¹ *Brown v. Phelan*, 2 Swan (Tenn.), 629; *Meikel v. Savings Institution*, 36 Ind. 355; *Bechtel's Appeal* (Pa., 1890), 19 Atl. Rep. 412; *Beaman v. Russell*, 20 Vt. 205; *Bailey v. Taylor*, 11 Conn. 531; *McCormick v. Fitzmorris*, 39 Mo. 34; *Muckleroy v. Bethany*, 27 Tex. 551.

² *Elgin v. Hall*, 82 Va. 680; *Hess' Appeal*, 26 W. N. C. 121; *Capehart v. Mills* (Ala., 1893); *Johnson v. First Mar. B. R.*, 28 Neb. 492; *Tillon v. Insurance Co.*, 7 Barb. 564; *Stayner v. Joyce*, 120 Ind. 99; *Hartley v. Carboy*, 150 Pa. St. 23; *Newcome v. Presbury*, 8 Met. 406; *Nesbitt v. Turner*, 155 Pa. St. 429. As to expert evidence to explain alterations, see § 141.

³ In *re Carver*, 23 N. Y. S. 753;

Bailey v. Taylor, 11 Conn. 531; *Coulson v. Walton*, 9 Pet. 62; *Russell v. Longmore*, 29 Neb. 209; *Zimmerman v. Camp*, 155 Pa. St. 352.

⁴ *Stillwell v. Patton*, 18 S. W. Rep. 1075; 108 Mo. 353; *Boothby v. Stanley*, 34 Me. 515; *No. Riv. Meadow Co. v. Shrewsbury Church*, 2 N. J. Eq. 424; *Houston v. Jordan*, 82 Tex. 352; *Dow v. Jeurl*, 18 N. H. 356; *Galland v. Jackman*, 26 Cal. 85; *United States v. Linn*, 1 How. 104; *Harding v. Bank*, 81 Iowa, 499; *Bedgood v. McLain*, 89 Ga. 793; *Jackson v. Osborn*, 2 Wend. 555.

⁵ *Tiedeman on R. P.*, § 790; *Wilde v. Armsby*, 6 Cush. 314; *Comstock v. Smith*, 26 Mich. 306; *Knight v. Clement*, 8 A. & E. 215; *Herrick v. Malin*, 22 Wend. 388; *Beaman v. Russell*, 20 Vt. 205; *Bailey v. Taylor*, 11 Conn. 531; *Hunting v. Finch*, 3

and leave it for the jury to decide where and when the alteration occurred.¹

A will, unlike a deed, is subject to change until the death of the testator. It is also customary for persons to alter their wills after execution; and for this reason, unattested alterations are, in the absence of evidence showing when they were made, presumed to have been made subsequent to execution of the will² or codicil, if the latter does not expressly refer to them.³

In regard to alterations in other instruments, no presumptions as to their date are generally recognized. But where it is shown that a note has been altered after execution, it will be presumed to have been done fraudulently⁴ and without the knowledge or consent of the maker;⁵ and a party producing and claiming under such an instrument will have the burden of proof cast upon him to explain every material alteration that would be in his favor.⁶

Ohio, 445; *Jordan v. Stewart*, 23 Pa. St. 244.

¹ *McCormick v. Fitzmorris*, 39 Mo. 34. "In the absence of proof the presumption is that a correction by erasure in a deed was made before execution. This doctrine rests upon principle; and a deed cannot be altered after it is executed without fraud or wrong. The cases are not uniform, but the most stringent ones leave the question to the jury." *Little v. Herndon*, 10 Wall. 31.

² *Wetmore v. Curry*, 5 Redf. 544; *Wright v. Wright*, 5 Ind. 389; *Dyer v. Irving*, 2 Dem. 160; *Wheeler v. Bent*, 7 Pick. 61.

³ *Rowley v. Merlin*, 6 Jur. (N. S.) 1165. A will found mutilated is presumed to have been torn after its execution. *Christmas v. Whingates*, 32 L. J. Prob. 73. "To draw cross-lines over the face of an instrument is a common mode of showing an intention thereby to make an end of it. In earlier times, when few persons could write, the mass of men

could manifest their intention with pen and ink only by unlettered marks. When the instrument is so marked by the maker as to show clearly that the act was designed to be a canceling, that act becomes effectual as a revocation." *Warner v. Warner's Estate*, 37 Vt. 362-63.

⁴ *Robinson v. Reed*, 46 Iowa, 220; *Shroeder v. Webster* (Iowa, 1893), 55 N. W. Rep. 569.

⁵ See cases in last note; *Soaks v. Eichberg*, 42 Ill. App. 375; *Croswell v. Labree*, 81 Me. 44.

⁶ *Hill v. Nelmes*, 86 Ala. 442; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Knight v. Clements*, 8 A. & E. 215; *Hartley v. Carboy*, 150 Pa. St. 23; *Hills v. Barnes*, 11 N. H. 395; *Nesbitt v. Turner*, 155 Pa. St. 429; *Humphreys v. Guillow*, 13 N. H. 385; *Clark v. Eckstein*, 22 Pa. St. 507; *Printup v. Mitchell*, 17 Ga. 558; *Mathews v. Coalter*, 9 Mo. 705; *Barringer v. Bank*, 14 S. & R. 405; *Beaman v. Russell*, 20 Vt. 205.

Substantial identity of name as a rule creates a presumption of identity of person,¹ which is rebuttable by slight circumstances, as by a difference of a single letter,² or where to support the presumption it is necessary to impeach the presumptive correctness of records of a court of law.³

§ 130. **Private writings lost or destroyed.**—Where a party's right or title is founded upon a private writing, including under that term deeds of release and conveyances, bonds, promissory notes and other evidences of indebtedness, he will be required to produce it in evidence or to account satisfactorily for its absence.⁴ In case it is alleged to be lost or destroyed, the party will be required to show by clear proof that the paper once existed,⁵ and that a careful and *bona fide* search has been made for it without success. The circumstances of the search having been thus shown *prima facie*, the oath of the party that the instrument is lost or destroyed is admissible and must be introduced.⁶

¹ Stallings v. Whitaker, 55 Ark. 494; Tausig v. Glenn, 51 Fed. Rep. 409; Simonsen v. Dolan (Mo., 1893), 21 S. W. Rep. 510; Guestin v. Mombleu (Ill., 1893), 32 N. E. Rep. 49; Galv. etc. Co. v. Daniels, 1 Tex. Civ. App. 695; State v. McGuire, 87 Mo. 642; People v. Rolfe, 61 Cal. 541; Hatcher v. Rochelaw, 18 N. Y. 87; Grindle v. Stone, 78 Me. 176; Bell v. Brewster, 44 Ohio St. 690. Parties named in deeds constituting a chain of title are presumed to be the same persons who claim under it. Cross v. Martin, 46 Vt. 14; Chamble v. Martin, 27 Tex. 139. Of two persons of the same name mentioned it is presumed that the elder is meant. Bennett v. Libhart, 27 Mich. 489; Brown v. Metz, 33 Ill. 339; Getts v. Watson, 18 Mo. 274; Cates v. Loftus, 3 A. K. Marsh. 202.

² Burford v. McCue, 53 Pa. St. 427; Gonzalia v. Bartelman (Ill., 1893), 32 N. E. Rep. 532; Bennett v. Libhart, 27 Mich. 489; Howard v. Lock (Ky., 1893), 22 S. W. Rep. 332.

³ Bryan v. Kales (Ariz., 1893), 31 Pac. Rep. 517. The middle name or its initial is no part of a person's name. Long v. Campbell, 37 W. Va. 665; Johnson v. Day, 2 N. D. 295.

⁴ §§ 30-34.

⁵ Gorgas v. Hertz, 150 Pa. St. 538. So it has been said that the lost instrument must be proved to have been executed, though strict proof of the act of execution would perhaps be dispensed with if its existence as a valid and binding obligation was shown. Gillis v. Wilmington R. Co., 13 S. E. Rep. 11; Johnson v. Railroad Co., 90 Ala. 505; Kelsey v. Hanmer, 18 Conn. 311; Porter v. Ferguson, 4 Fla. 102; Wakefield v. Day, 41 Minn. 344; Irving v. Campbell, 56 N. Y. Super. Ct. 224.

⁶ Patterson v. Winn, 5 Pet. 240; Bingham v. Hyland, 6 N. Y. S. 75; Lynn v. Morse, 76 Iowa, 665; Dulaney v. Walsh, 22 S. W. Rep. 131; Riggs v. Tayloe, 9 Wheat. 486; Page v. Page, 15 Pick. 368; Shirley v. Dewey, 17 Ohio, 156; Chamberlain

Whether the loss or destruction of the instrument is satisfactorily shown is a preliminary question for the court. The amount of diligence required depends largely, if not wholly, upon the circumstances of each case as it arises, less diligence being demanded where the document is old or where it was presumed to be of little value.¹ As a rule it is necessary that the loss or destruction of the instrument should be shown *before* parol proof can be received of its contents.²

This rule should be taken with some modification, as it is usually necessary to state, though not precisely, some of the contents of the instrument as descriptive of it.³ Where the lost instrument in the hands of a *bona fide* holder would be valid against the maker though he had been compelled to pay its amount, the proof of its loss or destruction must be of sufficient cogency to convince the court and jury upon all the circumstances that the maker will not be compelled to pay it again.⁴ But in modern practice the requirement that the plaintiff shall give security to reimburse the defendant in case

v. Gorham, 20 Johns. 144; Bigelow v. Summers, 28 Fla. 759. *Cf.* Overand v. Menczer, 83 Tex. 123; Anthony v. Beale, 111 Mo. 637.

¹ Jameson v. Snyder (Wis., 1890), 48 N. W. Rep. 261; Glassell v. Mason, 32 Ala. 719; Page v. Page, 15 Pick. 368; Blalock v. Miland, 87 Ga. 573; Bachelder v. Nutting, 16 N. H. 261; Woodworth v. Barker, 1 Hill, 176; Kelsey v. Hanmer, 18 Conn. 311; Bruns v. Close, 9 Colo. 225; Bohart v. Chamberlain, 99 Mo. 622.

² McClure v. Campbell (Neb., 1888), 40 N. W. Rep. 595; Roehl v. Hanmessenger, 114 Ind. 311; Georgia, etc. Co. v. Strickland, 80 Ga. 776; 6 S. E. Rep. 27; Woods v. Burke, 67 Mich. 674; 35 N. W. Rep. 768; Columbus, etc. v. Tillman, 79 Ga. 607; 5 S. E. Rep. 135; Smith v. Lindsay, 89 Mo. 76; Chamberlain v. Boon, 74 Tex. 659; Nichols v. Howe, 43 Minn. 181; Mugge v. Adams, 76 Tex. 448; Brown v. Griffith, 70 Cal. 14; Ross v. Goodwin, 88 Ala. 390; Chicago, etc. Co. v. Brown,

44 Kan. 384; Simpson v. Walby, 63 Mich. 439; Terpening v. Holton, 9 Colo. 306; Wolff v. Mathews, 39 Mo. App. 376; Phillips v. Trow. Fur. Co., 86 Ga. 699; Kilgore v. Stanley, 90 Ala. 523; Ebersole v. Rankin, 102 Mo. 488; Rush v. French, 1 Ariz. 99; Ford v. Cunningham, 87 Cal. 209. A careful search in the place where the document was last seen, was usually kept or is most likely to be found is sufficient. Bruns v. Close, 9 Colo. 225; Henry v. Diviney, 101 Mo. 378; Foot v. Silliman, 77 Tex. 268.

³ Flinn v. McGonigle, 9 W. & S. (Pa.) 75; Bouldin v. Massie, 7 Wheat. 122, 154, 155; Tetes v. Volmer, 58 Hun, 1; Crain v. Huntington, 81 Tex. 614; 17 S. W. Rep. 243.

⁴ Anderson v. Roleson, 2 Bay, 495; Rowley v. Ball, 3 Cowen, 303; Dulaney v. Walsh, 22 S. W. Rep. 131; Swift v. Stevens, 8 Conn. 431; Lanbach v. Mires, 141 Pa. St. 447; Boteler v. Dexter, 20 D. C. 26; Hill v. Bub, 35 Neb. 524.

an instrument lost before maturity shall be found would perhaps dispense with this requirement.¹

§ 131. **Handwriting defined — Signature by mark.**— By the term “handwriting” is meant not only handwriting commonly so called, but every mark made upon paper, parchment or similar substance by which the mental state of the person writing is revealed to others.² It is well settled that a mark is equivalent to a signature for all purposes for which the latter may be required,³ even though the marksman is able to write.⁴ And generally, where a mark is affixed to a writing not requiring attestation or subscription by witnesses, its execution may be proved by the evidence of one who saw the party write his mark or by the admission of the party himself.⁵

Though a subscribing witness may prove his own signature by mark,⁶ ordinarily it is necessary that his signature should be written by himself or some one for him; for while the handwriting of a subscribing witness may be proved in his absence by ordinary methods,⁷ his mark alone cannot be thus

¹ Means v. Kimball, 35 Neb. 693; Bloomington v. Smith, 23 N. E. Rep. 972.

² Lyon v. Lyman, 9 Conn. 55; Com. v. Webster, 5 Cush. (Mass.) 305; Rex v. Cator, 4 Esp. 117.

³ Tiedeman on R. P. 876; Wiloughby v. Moulton, 47 N. H. 205; Worden v. Van Gieston, 6 Dem. (N. Y. Sur.) 237; State v. Byrd, 93 N. C. 624; Paisley v. Snipes, 2 Brev. (S. C.) 200; Osborne v. Cook, 11 Cush. 532; Lord v. Lord, 58 N. H. 7; Chappee v. Baptist Miss. Con., 10 Paige, 85. The seal of a corporation is at common law its signature, and, in the absence of statute, it is not necessary that its deed should be signed with the corporate name. Sealing and delivery are the only indispensable requirements to the valid execution of a conveyance by a corporation. Ang. & Ames, Corp., § 225; City v. Shawhan, 9 Am. & Eng. Corp. Cas. 556; Flint v. Clinton, 12 N. H. 480; Gordon v. Preston, 1 Watts (Pa.), 385;

Osborne v. Tunis, 1 Dutch. (N. J.) 633; Tenney v. East Warren, etc. Co., 43 N. H. 343; Frankfort v. Anderson, 3 A. K. Marsh. 932; Beckwith v. Windsor Co., 14 Conn. 594.

⁴ Baker v. Denning, 8 A. & E. 94; Barnard v. Heydrick, 49 Barb. 68; 1 Whart. Evid., § 696.

⁵ State v. Byrd, 93 N. C. 624; Thompson v. Davitt, 59 Ga. 472; Jones v. Hough, 77 Ala. 437; Eichelberger v. Sifford, 27 Md. 320; Robinson v. Robinson, 20 S. C. 567; Fogg v. Dennis, 3 Humph. (Tenn.) 47; Shank v. Butsch, 28 Ind. 19; Balinger v. Davis, 29 Iowa, 512; Sanborn v. Cole, 63 Vt. 590.

⁶ Thompson v. Davitt, 59 Ga. 472.

⁷ McDermott v. McCormack, 4 Harr. (Del.) 543; Engles v. Bruington, 4 Yeates (Pa.) 345; Lyons v. Holmes, 11 S. C. 429; Devereux v. McMahan, 102 N. C. 284; Bussy v. Whitaker, 2 Nott & McC. (S. C.) 374; Maine v. Ryder, 84 Pa. St. 217.

proved,¹ and is only valid as a signature when, after having made his mark, his name is affixed by some one in his presence with his assent or by his request.²

§ 132. **Production of writing, when necessary.**—The character of the evidence required in the proof of handwriting, the principles which govern its production and the competency of the witnesses are essentially the same in criminal and civil cases.³ But this rule is to be considered in the light of the doctrine that while a preponderance of evidence may suffice in a civil cause in a prosecution for a crime, the presumption of innocence obtains and the prisoner must be given the benefit of every reasonable doubt.⁴ Under ordinary circumstances the document whose handwriting is in question must be produced; but where its production is impossible for any valid reason, it will be dispensed with, and if its existence is satisfactorily proved and its absence is accounted for, the handwriting may be proved by a witness who saw the party write, or who being familiar with his writing has seen the lost instrument.⁵

§ 133. **Proof by admissions of party.**—That mode of proving handwriting which is the most simple and convincing is by the testimony of the writer himself upon the witness stand after he has inspected the writing.⁶ If the execution of the

¹ *Watts v. Kilburn*, 7 Ga. 356; *Carrier v. Hampton*, 11 Ired. L. (N. C.) 307; *Gilliam v. Parkinson*, 4 Rand. (Va.) 325; *Stevens v. Van Cleve*, 4 Wash. C. C. 262; *Allen v. Mass*, 27 Mo. 354.

² *Jesse v. Parker*, 6 Gratt. 57; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Lord v. Lord*, 58 N. H. 7.

³ *De La Motte's Case*, 21 How. St. Tr. 810; *Hammond's Case*, 2 Greenl. 33; 11 Am. Dec. 39.

⁴ See §§ 5-7.

⁵ *Abbot v. Coleman*, 22 Kan. 250; *Bigham v. Coleman*, 71 Ga. 176; *Bradley's Adm'r v. Long*, 2 Strobb. (S. C.) 160; *Bruce v. Crews*, 39 Ga. 544; *Porter v. Wilson et al.*, 13 Pa. St. 641; *Nuckols' Adm'r v. Jones*, 8 Gratt. (Va.) 267; *Houston v. Blythe*,

60 Tex. 506. Where the original writing is procurable it is error to admit a photograph of it. *Crane v. Dexter*, 5 Wash. St. 479. This rule was applied in the trial of an indictment for forgery where the prosecution was unable to produce the writing alleged to have been forged. *State v. Brackenridge*, 67 Iowa, 204; *State v. Shinbone*, 46 N. H. 497; *Hahn v. State*, 13 Tex. App. 383.

⁶ *McCaskle v. Amarine*, 12 Ala. 17; *Smith v. Prescott*, 17 Me. 277; *McCully v. Malcolm*, 9 Humph. (Tenn.) 187; *Royce v. Gazan*, 76 Ga. 79; *Leferts v. State*, 49 N. J. Law, 26. A witness will not be allowed to testify that the party admitted the genuineness of his signature to another writ-

instrument is not denied, evidence of the genuineness of the handwriting is not required, and an objection not taken at the time is deemed waived and unavailable on appeal.¹ So in some of the states the denial of the authenticity of the instrument is required to be in writing² verified by affidavit of the party.³ If he denies that he wrote or executed the instrument, its genuineness may be proved by the testimony of any competent witness who was present and saw him write it,⁴ or by evidence of his extra-judicial admissions made verbally or by conduct that he executed it,⁵ whether made before or perhaps after the action was begun.⁶ Such an admission is never conclusive unless fraudulently made, or unless it was relied on and acted upon to the extent that it will constitute an estoppel *in pais*.⁷

§ 134. When proof of handwriting may be dispensed with — Acknowledgments.—If, as is the case in many states, deeds or other instruments are made by statute *prima facie* evidence when duly acknowledged or recorded, proof of handwriting or execution by subscribing witnesses or others is unnecessary.⁸

ing and that such signature is precisely similar to the one disputed. Second Nat. Bank v. Wentzel, 151 Pa. St. 142.

¹ Clark's Ex'rs v. Cochran, 3 Mart. (La.) 353, 360; National Union Bank of Swanton v. Marsh, 46 Vt. 443. This is the statute law in many states. Coler v. County (N. M., 1892), 27 Pac. Rep. 619.

² Smith v. King (Iowa, 1893), 55 N. W. Rep. 88; Clark's Ex'rs v. Cochran, 3 Mart. (La.) 353, 360; National Union Bank of Swanton v. Marsh, 46 Vt. 443.

³ Bestor v. Roberts, 58 Ala. 331; Duncan v. Brown, 15 B. Mon. (Ky.) 186; Smith v. Elmert, 47 Wis. 479.

⁴ Bayly v. Fourchy, 32 La. Ann. 136; Robinson v. Arnet, 15 La. 262; Com. v. Nefus, 135 Mass. 533; Bank v. Marsh, 46 Vt. 443; Bowman v. Sanborn, 25 N. H. 87.

⁵ Shaver v. Ehle, 16 Johns. (N. Y.) 201; State v. Byrd, 93 N. C. 624; Glazier v. Streamer, 57 Ill. 91.

⁶ Philadelphia, etc. Co. v. Hickman, 28 Pa. St. 318.

⁷ See *ante*, §§ 82-84; Salem Bank v. Gloucester Bank, 17 Mass. 1, 27; Helmsley v. Loader, 2 Campb. 450; Bell v. Shields, 4 Harr. (19 N. J.) 93; Cohen v. Teller, 93 Pa. St. 123; Dow's Ex'rs v. Spinney's Ex'rs, 29 Mo. 386; Weed et al. v. Carpenter, 4 Wend. (N. Y.) 219; Hammond v. Varian, 54 N. Y. 398.

⁸ "An acknowledgment regular on its face makes the instrument evidence without further proof. The exact words of the statute need not be followed; it is sufficient if the meaning be clearly and fully expressed." Wickersham v. Reeves, 1 Iowa, 417; Fenton v. Miller, 94 Mich. 204; Parroski v. Goldberg, 80 Wis.

If, as is the case in this country, a deed must be properly acknowledged to obtain record, one which is not so acknowledged will not be valid as against *bona fide* purchasers for value and without notice. But an unrecorded deed, or one improperly acknowledged, is always valid, as between the parties and all others having actual or constructive notice thereof,¹ and may be read in evidence in any action between the parties or their privies on proof by witnesses.²

§ 135. Who may take acknowledgments.—Acknowledgments are generally taken by notaries public, commissioners or other officials designated by statute. A *de facto* official,³ or a deputy acting for and signing in the name of his principal,⁴ and sometimes where he signs in his own name,⁵ may take an acknowledgment. So it has been held the fact that an official who possesses statutory authority to take acknowledgments is also an attesting witness,⁶ a relative of⁷ or attorney for the grantor,⁸ or is himself the grantee,⁹ does not

399; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 624; *N. Y. Phar. Ass'n v. Tilden*, 14 Fed. Rep. 740; *Houghton v. Jones*, 1 Wall. (U. S.) 702. Cf. *Blackman v. Riley*, 63 Hun, 521; 28 Abb. N. C. 126. A state grant under seal is admissible as evidence without acknowledgment where no statute requires it. *Chicago, etc. Co. v. Keegan*, 81 N. E. Rep. 550. In the absence of statute an acknowledgment does not dispense with proof of execution (*Mullis v. Cairns*, 5 Blackf. (Ind.) 77), which may be shown by the testimony of the party before whom the acknowledgment was made. *Kidd's Adm'r v. Alexander*, 1 Rand. (Va.) 456; *Eichelberger v. Sifford*, 27 Md. 320.

¹ *Bacon v. Railroad Co.*, 131 U. S. 258; *Shotwell v. Harrison*, 23 Mich. 410; *Banbury v. Sheerin* (S. D., 1893), 55 N. W. Rep. 723; *Mankin v. Emons*, 47 Mo. 306; *Ellison v. Wilson*, 36 Vt. 67; *Cable v. Cable*, 146 Pa. St. 451; *Sicard v. Peters*, 6 Pet. 136; *Forrester v. Parker*, 14 Daly, 208; *Mann v. State*, 46 Ind. 383,

² *Shaffer v. Hahn*, 111 N. C. 1; *Trenwith v. Smallwood*, 111 N. C. 132; *Beaman v. Whitney*, 20 Me. 413.

³ *Woodruff v. McHarry*, 56 Ill. 218; *Hamilton v. Pitcher*, 53 Mo. 354.

⁴ *Cook v. Knott*, 28 Tex. 85; *Gibbons v. Gentry*, 20 Mo. 468; *Hope v. Sawyer*, 14 Ill. 254; *Gordon v. Leech*, 81 Ky. 229; *Emmal v. Webb*, 36 Cal. 203; *Lynch v. Livingston*, 8 Barb. (N. Y.) 463.

⁵ *Talbot v. Houser*, 12 Bush (Ky.), 408; *Touchard v. Crow*, 20 Cal. 150; *McCraven v. McGuire*, 23 Miss. 100; *Herndon v. Reed*, 82 Tex. 647; *Summer v. Mitchell*, 29 Fla. 179; *Coltrane v. Lamb*, 109 N. C. 209.

⁶ *Baird v. Evans*, 58 Ga. 350.

⁷ *Lynch v. Livingston*, 6 N. Y. 433; *Remington Co. v. Dougherty*, 81 id. 474.

⁸ *Romanes v. Frazier*, 16 Grant (U. C.), 97.

⁹ *Bennett v. Shipley*, 82 Mo. 448. *Contra*, *Jones v. Porter*, 59 Miss. 628; *Tavener v. Barrett*, 21 W. Va. 658.

invalidate the acknowledgment. The majority of the cases hold, however, that an acknowledgment taken by an official who is personally interested is invalid.¹ An acknowledgment received by a notary or other official act done out of his territorial jurisdiction,² or after his term of office has expired,³ is invalid.

The venue should always appear in the body of the certificate,⁴ or in its caption or notarial seal,⁵ though if it is not stated the defect may be remedied by a reference to the instrument itself;⁶ and where no place is given, if the certificate is otherwise regular and the power of the notary to take acknowledgments is not disputed, it may be presumed that he acted within his jurisdiction.⁷

§ 136. **The certificate.**—This, in the absence of fraud, duress or a failure to obey some express statutory requirement, is usually conclusive as to all facts stated in it,⁸ and fraud, if alleged, must be clearly shown.⁹ The body of the certificate,¹⁰

¹ *Bank v. Radtke* (Iowa, 1893), 54 N. W. Rep. 435; *Davis v. Beazley*, 75 Va. 491; *Green v. Abraham*, 43 Ark. 420; *Hogans v. Caruth*, 18 Fla. 587; *Hammers v. Dole*, 61 Ill. 307; *Wasson v. Connor*, 54 Miss. 352; *Brown v. Moore*, 38 Tex. 645; *Dail v. Moore*, 51 Mo. 589. The grantor cannot take his own acknowledgment. *Beaman v. Whitney*, 22 Me. 413; *Davis v. Beazley*, *supra*; *Freeman v. Person*, 106 N. C. 251.

² *Thurman v. Cameron*, 24 Wend. (N. Y.) 91; *Mut. Ins. Co. v. Carey*, 54 Hun, 493; *Hedges v. Ward*, 15 B. Mon. (Ky.) 106; *Jones v. Reardon*, 3 Md. Ch. 57; *Hughes v. Wilkinson*, 37 Miss. 482; *Harris v. Burton*, 4 Harr. (Del.) 66.

³ *Carlisle v. Carlisle*, 78 Ala. 542; *Quimby v. Boyd*, 8 Cal. 194; *Galbraith v. Gallivan*, 78 Mo. 452; *Goodykoontz v. Olsen*, 54 Iowa, 174.

⁴ *Willard v. Cramer*, 36 Iowa, 22; *Dunlap v. Dougherty*, 20 Ill. 397.

⁵ *Chiniquy v. Catholic Bishop*, 41 Ill. 148; *Adams v. Medsker*, 25 W. Va. 128; *Sidwell v. Birney*, 69 Mo. 144; *Wright v. Wilson*, 17 Mich. 192.

⁶ *Trulick v. Peeples*, 1 Ga. 3; *Brooks v. Chaplin*, 3 Vt. 281; *Fuhrman v. London*, 13 S. & R. 386.

⁷ See *post*, §§ 231, 232; *Morrison v. White*, 16 La. Ann. 100; *Sidwell v. Birney*, 69 Mo. 144; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Douglas v. Carmean*, 49 Kan. 674; *Chamberlain v. Pybas*, 81 Tex. 511.

⁸ *Oppenheimer v. Wright*, 106 Pa. St. 569; *Hill v. Bacon*, 43 Ill. 477; *Smith v. McGuire*, 67 Ala. 34; *Allen v. Lenoir*, 53 Miss. 321; *Cox v. Gill*, 83 Ky. 669; *Tooker v. Sloan*, 30 N. J. Eq. 94; *Hitt v. Jenks*, 123 U. S. 301; *Young v. Duval*, 109 U. S. 573. Cf. *Jackson v. Cairns*, 20 Johns. (N. Y.) 300; *Davis v. Agnew*, 67 Tex. 210; *Linsley v. Brown*, 13 Conn. 192; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Russell v. Seminary*, 75 Ill. 337; *Cover v. Manaway*, 115 Pa. St. 345; *Greene v. Godfrey*, 44 Me. 25.

⁹ *Stevens v. Hampton*, 46 Mo. 104; *Meyer v. Gassett*, 38 Ark. 377, and cases in last note.

¹⁰ *Trustees v. McKechnie*, 90 N. Y. 618; *Brown v. Farrar*, 3 Ohio, 140; *Wright v. Bundy*, 11 Ind. 398; *Evans*

its official seal¹ or signature² must show the character of the official certifying to the acknowledgment, and where this appears he will be presumed to have possessed adequate authority and to have acted within his jurisdiction. But when his official character does not appear it may be shown by extrinsic evidence.³ But generally if a form or mode of acknowledgment is prescribed by statute, a substantial, if not a strict, compliance will be required to be observed both by the notary and by the party executing the conveyance,⁴ though the omission of the date,⁵ or of immaterial words,⁶ the insertion of those which are vague and equivocal,⁷ redundant and superfluous⁸ or ungrammatical⁹ will not vitiate a certificate other-

v. Lee, 11 Nev. 194; Baze v. Arper, 6 Minn. 220; Carpenter v. Dexter, 8 Wall. 513; Belo v. Mayer, 79 Mo. 67.

¹Harding v. Curtis, 45 Ill. 252. Where a statute prescribes the form of the official seal it must be strictly followed (Holbrook v. Nichol, 36 Ill. 161; Dail v. Moore, 51 Mo. 589; Hewitt v. Morgan (Iowa, 1893), 55 N. W. Rep. 478; Fleming v. Richardson, 13 La. Ann. 414; Buel v. Irvin, 24 Mich. 145; Pitts v. Seavey (Iowa, 1893), 55 N. W. Rep. 480; Meskimen v. Day, 35 Kan. 46), or the deed will not be received in evidence. Where no special form of sealing is required, its omission or the use of a scroll or other informal device is not material. Limberger v. Tidwell, 104 N. C. 506; Harrison v. Simmons, 55 Ala. 510; Equitable M. Co. v. Kempner, 84 Tex. 102; Cole v. Wright, 70 Ind. 179; Commissioners v. Glass, 17 Ohio, 342; Summer v. Mitchell, 29 Fla. 179; Mitchner v. Holmes (Mo., 1893), 20 N. W. Rep. 1070.

²Summer v. Mitchell, 29 Fla. 179; Cassell v. Cooke, 8 Serg. & R. 368; Johnson v. Haines, 2 Ohio, 278; Carlisle v. Carlisle, 78 Ala. 542.

³Shults v. Moore, 1 McLean (U. S.), 520; Bennet v. Paine, 7 Watts, 334; Vanness v. Bank, 13 Pet. 21; Scott v. Gallagher, 11 S. & R. 347. See *post*, § 220.

⁴McDaniel v. Needham, 61 Tex. 269; Knighton v. Smith, 1 Oreg. 276; Buell v. Irwin, 24 Mich. 145; Jacobway v. Gault, 20 Ark. 190; Rogers v. Adams, 66 Ala. 600; Dewey v. Campau, 4 Mich. 565; Wickersham v. Reeves, 1 Iowa, 413; Trammel v. Thurmond, 17 Ark. 203.

⁵Huxley v. Harrold, 62 Mo. 616; Rackleff v. Norton, 19 Me. 274; Kelly v. Rosenstock, 45 Md. 389; Yorty v. Paine, 62 Wis. 154; Brooks v. Chaplin, 3 Vt. 281.

⁶Todd v. Jones, 22 Iowa, 146; Hiles v. La Flesh, 59 Wis. 465; Magness v. Arnold, 31 Ark. 103; Wilcoxon v. Osborn, 77 Mo. 621; Solyer v. Romanet, 52 Tex. 562; Harrington v. Fish, 10 Mich. 415; Hartshorn v. Dawson, 79 Ill. 108; Gorman v. Stanton, 5 Mo. App. 585; Gordon v. Leech, 81 Ky. 229; Donahue v. Mills, 41 Ark. 421.

⁷Gray v. Kauffman, 82 Tex. 65; Hurt v. McCartney, 18 Ill. 129; Belcher v. Weaver, 46 Tex. 293.

⁸Tourville v. Pierson, 39 Ill. 446; Bradford v. Dawson, 2 Ala. 203; Thompson v. Johnson, 84 Tex. 548; Gray v. Kauffman, 82 id. 65; Nelson v. Graff, 44 Mich. 433; Whitney v. Arnold, 10 Cal. 531.

⁹Frostburg, etc. v. Brace, 51 Md. 508.

wise complete and regular.¹ A notary public may amend his incorrect certificate, and the amendment will operate as of the date of the acknowledgment.

The taking of an acknowledgment is a ministerial act, and in a proper case a *mandamus* will lie to compel any official to correct his clerical mistakes,² though it seems that he will not be allowed to do so after he is out of office.³ If the official is dead or cannot be found, or if his term of office has expired, the aid of equity may be invoked to correct the mistake by reforming the certificate of acknowledgment so that it will conform to the facts in the case.⁴

The omission of recitals of essential facts, such as the personal appearance of the grantor, or his name, or the personal acquaintance of the notary with him, as tending to identify him, or the fact that he acknowledges or executes the deed, may invalidate the certificate as evidence of execution, for these *data* cannot be supplied by parol evidence.⁵ But an invalid certificate of acknowledgment does not necessarily destroy the value of the writing as evidence, for the defective acknowledgment will then be regarded as an attestation, and the officer may prove the deed as a subscribing witness.⁶ On

¹ See, also, *Chouteau v. Allen*, 70 Mo. 290; *Durst v. Daugherty*, 81 Tex. 650; *Sharp v. Hamilton*, 12 N. J. L. 109; *Smith v. Williams*, 38 Miss. 48; *Dundas v. Hitchcock*, 12 How. (U. S.) 256; *Coombes v. Thomas*, 57 Tex. 321; *Ives v. Kimball*, 1 Mich. 308. So the fact that the certificate properly executed is on a separate piece of paper and pasted to the conveyance is not material. *Schram v. Gentry*, 63 Tex. 283.

² *Hutchinson v. Ainsworth*, 63 Cal. 286; *Fall v. Roper*, 3 Head (Tenn.), 285; *Ralston v. Moore*, 83 Ky. 571; *Skinner v. Fulton*, 39 Ill. 484; *Jordan v. Corey*, 2 Ind. 385; *Elliott v. Peirsol*, 1 Pet. 328; *Miller v. Powell*, 53 Mo. 252.

³ *Gilbraith v. Gallivan*, 78 Mo. 452.

⁴ *Cressena v. Sowers*, 26 W. N. C. 133; *Simpson v. Montgomery*, 25

Ark. 365; *Gilbraith v. Gallivan*, 78 Mo. 452; *Johnson v. Taylor*, 60 Tex. 360. *Contra*, *Miller v. Powell*, 53 Mo. 352; *Hand v. Weidner*, 151 Pa. St. 362; *Stodolka v. Novotus* (Ill., 1893), 33 N. E. Rep. 534.

⁵ *Frost v. Cattle Co.*, 81 Tex. 505; *Ennor v. Thompson*, 46 Ill. 215; *Rollins v. Menager*, 22 W. Va. 461; *Williams v. Baker*, 71 Pa. St. 476; *Leckman v. Harding*, 65 Ill. 505; *Ridgely v. Howard*, 3 Har. & McH. (Md.) 321; *Hayden v. Westcott*, 11 Conn. 129; *Newman v. Samuels*, 17 Iowa, 528; *Jacoway v. Gault*, 20 Ark. 190; *Gaines v. Catron*, 1 Humph. (Tenn.) 514; *Fryer v. Rockefeller*, 63 N. Y. 268. And see §§ 205, 209.

⁶ *Hewitt v. Morgan* (Iowa, 1893), 55 N. W. Rep. 478; *Carlisle v. Carlisle*, 78 Ala. 542; *Torrey v. Forbes*, 94 id. 135; *Merch. Bank v. Harrison*, 39

the other hand, a valid certificate is intended merely to evidence the due execution of the deed, and if the deed is inoperative because of some material deficiency, it will not be validated by statements or admissions in the certificate.¹

§ 137. **Impeaching the certificate.**—The certificate of acknowledgment is a constituent part of the deed, and its recitals are notice to and are conclusively binding upon all who may have actual or constructive notice of the deed itself.² Between the immediate parties the recitals in the certificate may be impeached for fraud.³ So if the recitals that the notary was personally acquainted with the grantor, that the latter personally appeared before him and acknowledged the deed, or, in the case of a married woman's acknowledgment, that she was privily examined,⁴ are false, actual fraud exists which will invalidate the certificate as evidence in behalf of the original grantor or grantee or any subsequent party having knowledge of the fraud.⁵ When, however, the grantor has ratified the deed by the acceptance of the purchase-money, or the grantee has entered into possession, either would be estopped to plead the invalidity of the acknowledgment against the other or against some third person who had no notice of the fraud and had parted with value relying on the recitals in the acknowledgment.⁶

§ 138. **Proof by subscribing witnesses.**—The execution of the instrument which has been attested only must be proved

Mo. 433; Hutton v. Weber, 17 N. Y. S. 463; Sharp v. Hamilton, 12 N. J. L. 109; Grant v. Oliver, 91 Cal. 158. See *post*, § 138.

¹ White v. Connelly, 105 N. C. 65; Turner v. Connelly, 105 N. C. 72.

² Tiedeman on R. P. 810; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; Smith v. McGuire, 67 Ala. 34.

³ See *post*, § 208.

⁴ "In the case of a wife the certificate must show she was examined separate and apart from her husband; that she was of full age; that the contents of the deed were first made known to her, and that she acted of her own free will. Otherwise, though recorded, her acknowledgment con-

stitutes neither record nor notice." See Anderson's Law Dict., under "Acknowledgment." Paxton v. Marshall, 18 Fed. Rep. 361; Young v. Duvill, 109 U. S. 577; McMullen v. Eagan, 21 W. Va. 244.

⁵ Davis v. Jenkins (Ky., 1893), 20 S. W. Rep. 283; Eyester v. Hathaway, 50 Ill. 522; Williams v. Baker, 71 Pa. St. 482; Hartley v. Fresh, 6 Tex. 208; Grider v. Mortgage Co. (Ala., 1893), 12 S. Rep. 775; Holt v. Moore, 87 Ark. 148; Johnson v. Wallace, 53 Miss. 331; Marsh v. Mitchell, 26 N. J. Eq. 497; White v. Graves, 107 Mass. 325.

⁶ Mut. L. Ins. Co. v. Corey, 135 N. Y. 326.

by the production of the subscribing witnesses or of one of them in case he can testify to the circumstances of the attestation and prove all necessary facts concerning execution.¹

A subscribing witness is a witness who either was present and saw the act of execution or to whom the party subsequently acknowledged the execution, and who in either case, at the party's request, express or implied, attached his signature to attest the genuineness of the party's signature.²

This rule is not only applicable to such writings as deeds and wills which are required by statute to be acknowledged and attested,³ but is also extended to every writing that has actually been attested.⁴ So though a party is now a competent witness and may testify to the genuineness of his own signature, the production of the subscribing witnesses is not, it seems, thereby dispensed with,⁵ even where the party is shown to have admitted out of court that he executed the instrument.⁶

The exceptions to the rule which requires the proof of an attested writing by the production of subscribing witness must now be considered. In the first place, all attested writings over thirty years old, which are free from alterations and come from proper custody, are said, because of their antiquity, to prove themselves, and the witnesses need not be produced, though living.⁷

¹ Jackson v. La Grange, 19 Johns. 336; Turnipseed v. Hawkins, 1 McCord, 272; Dan v. Brown, 4 Cow. 433.

² 1 Greenl. on Evid., § 569a; Melcher v. Flanders, 40 N. H. 139; Huston v. Ticknor, 99 Pa. St. 238; Chaplain v. Briscoe, 19 Miss. 272; Marable v. Meyer, 78 Ga. 60; Hollenback v. Fleming, 6 Hill, 304; Pawtucket v. Ballou, 15 R. I. 58; Gallagher v. Kilkeary, 29 Ill. App. 415.

³ Post, § 269.

⁴ Warner v. B. & O. R. R., 31 Ohio St. 265; Hudson v. Puett, 86 Ga. 341; Barber v. Terrell, 54 Ga. 146; Leibe v. Hebersmith, 3 S. Rep. 283; Rich-

ardson, etc. Co. v. Jones (Ala., 1891), 9 S. Rep. 276.

⁵ Brigham v. Palmer, 3 Allen (Mass.), 450.

⁶ Abbot v. Plumbe, 1 Doug. 216; Rex v. Harrington, 4 M. & S. 353; Henry v. Bishop, 2 Wend. 575; Fox v. Reid, 3 Johns. 477. But where the execution of the writing is only collaterally and not directly involved, proof by subscribing witnesses will not be required. Curtis v. Belknap, 6 Washb. 433; Skinner v. Brigham, 126 Mass. 132; Com. v. Castles, 9 Gray, 121.

⁷ See § 105; Jackson v. Christman, 4 Wend. 277, 282, 283. Where both subscribing witnesses are dead, proof

The second class of exceptions comprises those cases where, on account of physical causes or mental incapacity or subsequently-acquired interest, the subscribing witness is unable or incompetent to testify. The proof by producing a subscribing witness may be dispensed with if the subscribing witness has become insane,¹ or has died,² or is shown to have left the state,³ or has become disqualified because of interest⁴ or infamy,⁵ or the party is unable to find him after a diligent search,⁶ or he was incompetent when he signed as a witness.⁷ Other proof is admissible where the witness denies or forgets that he was present at the execution.⁸

If it is sought to dispense with proof by subscribing witnesses because they cannot be found, the party must satisfy the court that he has made an honest and diligent search for them in places where they would probably be found and has inquired as to their whereabouts of acquaintances and relatives who would most likely be best informed.⁹ Where a

of execution raises a presumption that all proper details were strictly complied with. *Dupree v. Dupree*, 45 Ga. 415-442; *Ela v. Edwards*, *supra*; *Chaffee v. Baptist Miss. Con.*, 10 Paige, 25; *Fathere v. Lawrence*, 33 Miss. 622; *Eliot v. Eliot*, 10 Allen, 357; *Barnes v. Barnes*, 66 Me. 286; *Clark v. Dounorant*, 10 Leigh, 22.

¹*Dewey v. Dewey*, 1 Met. (Mass.) 349.

²*Martin v. Bowie* (S. C., 1893), 15 S. E. Rep. 736.

³*Troeder v. Hyams*, 27 N. E. Rep. 775; *Homer v. Wallis*, 11 Mass. 309; *Sluby v. Chaplin*, 4 Johns. 461; *Dunbar v. Marden*, 13 N. H. 311.

⁴*Hamilton v. Marsden*, 6 Binn. 45.

⁵*Jones v. Mason*, 2 Stra. 833.

⁶*Jackson v. Birton*, 11 Johns. 64; *Gallegher v. Association* (Pa., 1892), 24 Atl. Rep. 115.

⁷*Bank v. Root*, 2 Met. 522; *Nelins v. Buckell*, 1 Hayw. 19. See, also, 1 Greenl. on Evid., § 572, and cases cited; 1 Whart. Evid., §§ 705-40, and cases; *Smith v. Jones*, 6 Rand. 82;

Hawes v. Humphrey, 9 Pick. 357; *Jauncy v. Thorne*, 2 Barb. Ch. 40; *Dean v. Dean*, 1 Will. (Vt.) 746; *Greenough v. Greenough*, 11 Pa. St. 489; *Vernon v. Kirk*, 30 Pa. St. 218; *Hopkins v. Albertson*, 2 Bay, 484; *Hopkins v. De Graffenreid*, 2 Bay, 187; *Collins v. Elliot*, 1 Harr. & J. 2; *Jackson v. La Grange*, 19 Johns. 288, 289; *Sears v. Dillingham*, 12 Mass. 358, 361, 363; *Miller v. Miller*, 2 Bing. N. C. 76; *Jones v. Arterborn*, 11 Humph. 97; *Patten v. Tallman*, 27 Me. 29; *Verdier v. Verdier*, 8 Rich. (S. C.) 135; *Barker v. McFerran*, 26 Pa. St. 211; *Jackson v. Luquere*, 5 Cow. 221.

⁸*Whitaker v. Salisbury*, 15 Pick. 534; *Dewey v. Dewey*, 1 Met. 349; *New Haven Co. Bank v. Mitchell*, 15 Conn. 206; *Wynn v. Small*, 102 N. C. 133; *Baeder v. Jennings*, 40 Fed. Rep. 199.

⁹*Miller v. Miller*, 2 Bing. N. C. 76; *James v. Farnell*, 1 Turn. & R. 417; *Troeder v. Hyams* (Mass., 1890), 27 N. E. Rep. 775. Where there are sev-

writing which is alleged to have been executed by one party is introduced in evidence by his adversary upon notice, proof by the subscribing witnesses may be dispensed with where the execution is not denied by the other, upon the ground that the party demanding its introduction admits its execution and validity by claiming an interest or title under it.¹ Witnesses to deeds are intended merely to attest their execution, and cannot, like witnesses to wills, express opinions upon the mental capacity of the grantor.²

§ 139. Proof by witnesses acquainted with party's handwriting.—A person, even though he can neither read nor write,³ who is personally acquainted with the handwriting in question, is a competent witness for or against its authenticity.⁴ In case the knowledge was acquired solely for the purpose of testifying, then he is not a competent witness. The testimony of such a person is not secondary evidence as compared with the evidence of the alleged writer, nor is it rendered inadmissible because the latter, being in court, denies the handwriting;⁵ though it is clear that such testimony, unless positive and uncontradictory, would not carry much weight in a reasonable mind against the declaration of the party himself that the writing in dispute is not his.

The witness' acquaintance and familiarity with the writing may have been acquired by seeing the party write in circumstances where he had an opportunity of observing his handwriting and becoming acquainted with the peculiarities of his penmanship. Where a witness believes he can identify the

eral subscribing witnesses, the absence of all must be accounted for. *Kelsey v. Hanmer*, 18 Conn. 311.

¹ *Bradshaw v. Bennett*, 1 M. & Rob. 143; *Benton v. Baxley* (Ga., 1893), 15 S. E. Rep. 820; *Hanna v. Davis*, 112 Mo. 599; *Bell v. Chaytor*, 1 C. & K. 162. If the party alleged the deed to be a forgery, its execution must be proved by the one claiming under it. *Vaugh v. McElroy*, 82 Ga. 687.

² *Dean v. Fuller*, 40 Pa. St. 474.

³ *Foye v. Patch*, 132 Mass. 105.

⁴ *Wilson v. Van Leer*, 127 Pa. St. 371;

Bruyn v. Russell, 52 Hun, 17; *Salazar v. Taylor* (Col., 1893), 33 Pac. Rep. 369; *Succession of Marivant*, 45 La. Ann. 207; *Stoddard v. Hill* (S. C., 1893), 17 S. E. Rep. 138; *Board of Trustees v. Misenheimer*, 78 Ill. 22; *Tome v. Parkersburgh R. R. Co.*, 39 Md. 36; *Herrick v. Swomby*, 56 Md. 439, 460; *Mudd v. Suckermore*, 5 A. & E. 703 (31 E. C. L.); *Snyder v. McKeever*, 10 Bradw. (Ill.) 188; *Hynes v. McDermott*, 82 N. Y. 41.

⁵ *Williams v. Deen* (Tex., 1894), 24 S. W. Rep. 536.

writing he may testify to its character, though he may have seen the party write once only,¹ and that subsequent to the date of the disputed writing.² Doubtless the circumstance that a witness has often seen the party write will add to the value of his evidence; but this fact and the character of the occasion or period when he saw him write, though they may affect the credibility and weight of his evidence, are wholly immaterial as respects his competency as a witness.³

A witness familiar with the penmanship of a party's surname may testify to his full name,⁴ while one unacquainted with the individual signatures of the members of a firm may testify to the firm signature if acquainted with it.⁵ In the second place, personal acquaintance with the party's handwriting may be acquired by having carried on a correspondence with him.⁶

¹ *Egan v. Murray* (Iowa, 1890), 45 N. W. Rep. 563; *Hopper's Adm'r v. Ashley*, 15 Ala. 457; *Woodford v. McClenahan*, 4 Gilm. (9 Ill.) 85; *Smith v. Walton*, 8 Gill (Md.), 77; *Com. v. Nefus*, 135 Mass. 533; *North v. McConnell*, 42 Mich. 473; *Rideout v. Newton*, 17 N. H. 71; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *McNair v. Com.*, 26 Pa. St. 338; *Means v. Means*, 7 Rich. (S. C.) 533; *Demonheun v. Walker*, 4 Baxt. (Tenn.) 199; *Pepper v. Barnett*, 22 Gratt. (Va.) 405; *Succession of Marvant*, 45 La. Ann. 207.

² *Keith v. Lathrop*, 10 Cush. (Mass.) 553; *Railroad Co. v. Hickman*, 28 Pa. St. 318.

³ In these cases the witness often saw the party write: *Royce v. Cazan*, 76 Ga. 79; *Bruyn v. Russell*, 52 Hun. 17; *Long v. Little*, 119 Ill. 600; *Haynes v. Thomas*, 7 Ind. 38; *State v. Stair*, 87 Mo. 268; *State v. Gay*, 94 N. C. 814; *Cook v. Smith*, 1 Vroom (30 N. J.), 387; *State v. Hooper*, 2 Bailey (S. C.), 37; *Hopkins v. Meguire*, 35 Me. 78; *Lachance v. Loeblein*, 15 Mo. App. 460; *Hoitt v. Moulton*, 21 N. H. 586; *Donoghue v. People*, 6 Park. C. C. (N. Y.) 120; *State v.*

Anderson, 2 Bailey (S. C.), 567; *Pearson v. McDaniel*, 62 Ga. 100; *Sill v. Reese*, 47 Cal. 294; *Salazar v. Taylor* (Col., 1893), 33 Pac. Rep. 839; *Bevan v. Atlanta Bank*, 39 Ill. 577; *Williams v. Dean* (Tex., 1894), 24 S. W. Rep. 536.

⁴ *Lewis v. Sapio*, 1 M. & W. 39.

⁵ *Gordon v. Price*, 10 Ired. (N. C.) 385; *Brigham v. Peters*, 1 Gray (Mass.), 385.

⁶ *Gould v. Jones*, 1 W. Bl. 384, by Lord Mansfield, in 1761; *Ferrers v. Shirley*, Fitzgibbon, 195 (in 1763). In *Wade v. Boughton*, 3 V. & B., Lord Eldon, while confirming the doctrine, says the comparison of a single letter will never do for commitment. See *McKeon v. Barnes*, 108 Mass. 344; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351; *Pearson & Co. v. McDaniel*, 62 Ga. 100; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Empire Manuf. Co. v. Stuart*, 46 Mich. 482; *Gartrell v. Stafford*, 12 Neb. 545; *Com. v. Smith*, 6 S. & R. (Pa.) 567; *Clark v. Freeman*, 25 Pa. St. 133; *Atlantic Ins. Co. v. Manning*, 3 Col. 224; *Thomas v. State*, 103 Ind. 419; *Chaffee v. Taylor*, 3 Allen (Mass.), 508; *Southern Exp. Co. v. Thornton*,

The ground upon which evidence of familiarity with handwriting acquired by a correspondence with the party is admitted is that the conduct of the party is equivalent to the admission that the letters introduced were written by him. If the party made statements or gave instructions in his letter which were intended *prima facie* to be acted upon, and if it is shown that the recipient relied upon and was induced to act, and particularly if his action consists of further communications or of business transactions with him, and which are subsequently referred to in other letters, it will be very reasonable to presume that the documents were in the handwriting of the party.¹ The personal acquaintance may have been gained by the witness having seen² documents which the party admits to have been written by him; as when he holds deeds of conveyances in which the party is a grantor.³

Again, the acquaintance with the writing may have been acquired by the witness from actual personal contact with

41 Miss. 216; Whitley v. Gaylord, 1 Jones' L. (N. C.) 94; United States v. Simpson, 3 P. & W. (Pa.) 437; Parker v. Amazon Ins. Co., 34 Wis. 363; Com. v. Coe, 115 Mass. 481; Blair v. Pelham, 118 Mass. 420; Rumph v. State (Ga., 1893), 16 S. E. Rep. 104; Rogers v. Tyley (Ill., 1893), 32 N. E. Rep. 693.

¹ Murieta v. Wolfhagen, 2 C. & K. 744 (61 E. C. L.); Greaves v. Hunter, 2 C. & P. 477 (12 E. C. L.); Tharpe v. Gisburne, 2 C. & P. 21 (12 E. C. L.); Rex v. Slaney, 5 C. & P. 213 (24 E. C. L. 1832); Drew v. Prior, 5 M. & G. 264; Putnam v. Wadley, 40 Ill. 346; Mines v. Perry, 113 Mass. 274; Gibson v. Trowbridge Co. (Ala., 1893), 11 S. Rep. 365.

² It is necessary that the witness should have seen the papers long enough to have become familiar with the penmanship. United States v. Johnson, 1 Cranch (U. S.), 371; Stone v. Thomas, 12 Pa. St. 269.

³ Woodman v. Dana, 52 Me. 9; Johnson v. Daverne, 19 Johns. Ch. 134; Ennor v. Hodson, 28 Ill. App.

445; First Nat. Bank v. Hovell, 24 Ill. App. 594; Durnell v. Sowden (Utah, 1887), 14 Pac. Rep. 334; Smith v. Caswell (Tex., 1887), 4 S. W. Rep. 848; Gordon v. Price, 10 Ired. L. (N. C.) 385; Hopper v. Ashley, 15 Ala. 457; Gibson v. Trowbridge (Ala., 1893), 11 S. Rep. 365. Where the document has not been acknowledged, the circumstances should be such that the party is estopped by it. Allen v. State, 3 Humph. (Tenn.) 367; Hammond v. Varian, 54 N. Y. 398; Talbott v. Hines, 32 N. E. Rep. 788; Tucker v. Kellogg (Utah, 1892), 28 Pac. Rep. 870; Berg v. Peterson, 52 N. W. Rep. 37; 49 Minn. 420. The burden of proving the acknowledgment or estoppel is upon the party introducing the writing. Putnam v. Wadley, 40 Ill. 346; Bank v. Marsh, 46 Vt. 443; Brigham v. Peters, 1 Gray, 139; Bank v. Wenzel, 151 Pa. St. 142. The acknowledgment of an attorney for the party will not suffice. Goldsmith v. Bane, 8 N. J. L. 87; Greaves v. Hunter, 2 C. & P. 477.

him in commercial, social or professional relations. Thus, a corresponding clerk or a book-keeper may testify to the handwriting of one whose letters or books pass through his hands,¹ but in the ordinary course of business only.² One member of a family is a competent witness in the case of family correspondence.³ An executor may testify to the handwriting of his testator,⁴ or an attorney to that of his client.⁵

So where the authenticity of official records and documents or the handwriting of officials is in question, any person who has been in the habit of examining them while they were in official custody and through whose hands they have passed in the performance of private or official duty may testify to the genuineness of the handwriting.⁶

§ 139a. Mode of examining witnesses as to handwriting.—

A witness to handwriting may be cross-examined as to the source of his knowledge, and if he has any knowledge acquired under the circumstances above outlined its deficiency or inexactness, though detracting from the weight of his evidence, is no objection to his competency. Thus, though his actual belief that the writing in dispute is genuine may be a material element in the credibility of his testimony, yet the fact that he cannot swear from his own knowledge that he believes it to be the handwriting of the party is not an objection.⁷ If he is not cross-examined he need not state the

¹Smith v. Sainsbury, 5 C. & B. 196 (24 E. C. L.); Reid v. Hodgson, 1 Cranch (U. S.), 491; Titford v. Knott, 2 Johns. Ch. (N. Y.) 211; Murieta v. Wolfhagen, 2 C. & K. 744 (61 E. C. L.); Bruyn v. Russell, 52 Hun, 217.

²Assignees of Desbrow v. Farrow, 3 Rich. (S. C.) 382.

³Robinson Consolidated Mining Co. v. Craig, 4 N. Y. St. Rep. 478; Tuthill v. Rainy, 98 N. C. 513; Moody v. Rowell, 17 Pick. (Mass.) 490; Slaymaker v. Wilson, 1 P. & W. (Pa.) 216.

⁴Sharp v. Sharp et al., 2 Leigh (Va.), 249.

⁵Fitzwater Peerage Case, 10 Cl. & Fin. 193; Costello v. Crowell, 139 Mass. 588; Riggs v. Powell (Ill., 1893), 32 N. E. Rep. 482.

⁶Armstrong v. Fargo, 8 Hun, 175; Rogers v. State, 11 Tex. App. 608; Finch v. Gridley's Ex'rs, 25 Wend. (N. Y.) 469; Rogers v. Ritter, 12 Wall. (U. S.) 317; Com. v. Webster, 5 Cush. (Mass.) 295-301; Sill v. Reese, 47 Cal. 294; Board v. Misenheimer, 78 Ill. 22; Brown v. Lincoln, 47 N. H. 468; Doe v. Roe, 31 Ga. 593-599; Duncan v. Beard, 2 N. & McC. (S. C.) 400; Goddard v. Gloninger, 5 Watts (Pa.), 209; Sweigart, 8 Pa. St. 436; Taylor v. Cook, 8 Price, 650; Jones v. Huggins, 1 Dev. L. (N. C.) 223; Vickroy v. Skelly, 14 S. & R. (Pa.) 372; Turnipseed v. Hawkins, 1 McC. (S. C.) 272; Thomas v. Horlocker, 1 Dall. (Pa.) 14.

⁷Foster v. Jenkins, 30 Ga. 476; Bernheim v. Ayer, 36 N. H. 183; Hop-

source of his knowledge; for if he actually swears that he is acquainted with the handwriting it will be presumed that he is competent to testify.¹ Merely to testify that the writing is that of the party is not enough. He must testify that he knows the handwriting of the party,² and if he does not know it, it is within the province of the judge to reject him as incompetent.³

A person disqualified to testify because of interest against the representative of a decedent may be a witness to the handwriting of the deceased, though he cannot testify that he saw deceased sign a paper which has been destroyed.⁴ On the other hand, the fact that a witness is interested has been held to render him wholly incompetent as a witness to handwriting.⁵

The witness, if competent, will be permitted to refresh his memory before the trial, by referring to the writings from which his knowledge has been acquired.⁶ On the other hand,

per v. Ashley, 15 Ala. 457; Johnson v. Daverne, 19 Johns. 134; Talbott v. Hedges (Ind., 1893), 32 N. E. Rep. 788; Massey v. Farmers' Bank, 104 Ill. 327; Smythe v. Caswell, 67 Tex. 567; Lyon v. Lyman, 9 Conn. 55; Holmes v. Goldsmith, 147 U. S. 150; Guyette v. Bolton, 46 Vt. 228; Com. v. Andrews, 143 Mass. 23; Nagee v. Osborne, 32 N. Y. 669; Rumph v. State (Ga., 1893), 16 S. E. Rep. 104; Smith v. Walton, 8 Gill (Md.), 77; State v. Stair, 87 Mo. 268; Clark v. Freeman, 25 Pa. St. 413.

¹Henderson v. Bank, 11 Ala. 855; Moody v. Rowell, 17 Pick. (Mass.) 490; Salazar v. Taylor, 33 Pac. Rep. 369 (Colo., 1893); Empire Co. v. Stuart, 46 Mich. 482; Wittier v. Gould, 8 Watts (Pa.), 485; Bank v. Lierman, 5 Neb. 247; Bulen v. Granger, 29 N. W. Rep. 718; Goodhue v. Bartlett, 5 McLean, 185; Sartor v. Bullinger, 59 Tex. 411; Stoddard v. Hill (S. C., 1893), 17 S. E. Rep. 138.

²Boyle v. Coleman, 13 Barb. (N. Y.) 42; Richardson v. Stringfellow (Ala.,

1894), 14 S. Rep. 283; Bate v. People, 8 Ill. 644; Kinney v. Flynn, 2 R. I. 319; Watson v. McAllister, 7 Mart. 368; Carrier v. Hampton, 11 Ired. L. (N. C.) 307; Mapes v. Seales, 27 Tex. 345; Hann v. State, 13 Tex. App. 383; Slaymaker v. Wilson, 1 T. & W. 216.

³See cases *supra*, and Talbott v. Hedges, 32 N. E. Rep. 788 (Ind., 1893).

⁴Daniels v. Foster, 26 Wis. 686; Hussey v. Kirkwood, 95 N. C. 63.

⁵Rideout v. Newton, 17 N. H. 71; Robinson v. Robinson, 20 S. C. 567; Kirksey v. Kirksey, 41 Ala. 626; Truitt's Estate, 10 Phila. (Pa.) 16.

⁶See *post*, §§ 337, 338; United States v. Larned, 4 Cranch, 312; Redford v. Peggy, 6 Rand. (Va.) 316; McNair v. Com., 26 Pa. St. 288; Thomas v. State, 103 Ind. 419; Chester v. Armstrong, 66 Md. 113; Massey v. Bank, 104 Ill. 327; Worth v. McConnell, 42 Mich. 473; Smith v. Walton, 8 Gill (Md.), 77; Bank v. Jacobs, 1 P. & W. (Pa.) 161, 179.

other writings not relevant to the issue may be shown him, and he may be asked, to test the extent and accuracy of his knowledge, if they are genuine or spurious.¹ The party cross-examining the expert by questioning him as to the genuineness of irrelevant writings will be bound by his answer, as that is a collateral and irrelevant fact.² A person who on the stand denies the genuineness of a writing alleged to be his may, on cross-examination, be asked to write his name or other word for use as a standard of comparison.³ While a party should not be permitted to fabricate evidence by being asked to write his name on his direct examination when he disputes the authenticity of a writing,⁴ if he does so, another person who has only the knowledge of his writing which he has gained by seeing him write in court is not competent as a witness.⁵ Where a witness, on an issue of forgery, testifies that he wrote certain words in a genuine instrument not produced, he may be asked to write those words for comparison with the writing said to be forged.⁶

§ 140. **Comparison of handwriting.**—The distinction between evidence of the genuineness of handwriting founded upon the knowledge of the witness and that furnished by a comparison of papers or writings is important and well marked. "Comparison of handwriting occurs when other witnesses prove a paper to be in the handwriting of a party and the witness desires to take the papers in his hand, compare them, and determine whether they are or are not the same handwriting. There the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write nor held any correspondence with him."⁷

¹ *Armstrong v. Thurston*, 11 Md. 148; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47; *Howard v. Patrick*, 42 Mich. 121; *Bank v. Mudgett*, 44 N. Y. 514; *Massey v. Bank*, 104 Ill. 327; *Bacon v. Williams*, 13 Gray (Mass.), 527; *Rose v. Bank*, 91 Mo. 399; *Pierce v. Northey*, 14 Wis. 9; *Griffiths v. Avery*, 11 A. & E. 322.

² *People v. Murphy*, 135 N. Y. 450; 32 N. E. Rep. 138.

³ *Chandler v. Barron*, 45 Me. 534; *Roe v. Roe*, 40 N. Y. Sup. Ct. 1; *San-*

derson v. Osgood, 53 Vt. 309. But see, *contra*, *Bank v. Robert*, 41 Mich. 709; *Gilbert v. Simpson*, 6 Daly, 34.

⁴ *Williams v. State*, 6 Ala. 33; *King v. Donahue*, 110 Mass. 155; *United States v. Jones*, 10 Fed. Rep. 469. Cf. *State v. Koontz*, 5 S. E. Rep. 328.

⁵ *Reese v. Reese*, 90 Pa. St. 89.

⁶ *Huff v. Nims*, 11 Neb. 363.

⁷ *Duncan, J.*, in *Com. v. Smith*, 6 S. & R. (Pa.) 568, 571. See *Mudd v. Suckermore*, 5 A. & E. 703, 730; *Bouv. Dict.*, p. 351; *Burdick v. Hunt*,

The proof of handwriting by comparison has been a much litigated subject. In the eighteenth century this method of proof was recognized in the English ecclesiastical courts, the judges adopting the rule as it existed and was observed in the Roman law.¹ The doctrine met with strenuous resistance when its introduction was attempted in the courts of common law. It was argued that it would be useless to submit writings for comparison to jurors who could neither read nor write; that fraud might be practiced both in the writings in dispute and in the standards with which they would be compared; that handwriting is variable, adapting itself to the age, habits, education and mental state of the writer, to the condition of his writing materials and to the haste with which they are used. So the genuineness of the specimens offered for comparison might be impeached, causing the introduction of others with a consequential indefinite increase of collateral issues. But jurors are no longer illiterate, and, so far as fraud is concerned, either party may offer specimens for comparison. Nor will the adverse party be subject to unfair surprise, for he ought certainly to know what writings he has signed and to be able to recognize and explain any and all alterations in them.²

This matter is now settled in England by statute,³ and a similar statute has been enacted in many of the states of the Union. By these statutes, in the states of New York, New Jersey, Wisconsin, Iowa, Georgia, Louisiana and California, it is substantially provided that where the genuineness of any writing is in dispute it may be compared with any writing whatever proved or acknowledged to be genuine. The comparison is to be made by witnesses, who shall give their opin-

43 Ind. 381, 386; *Travis v. Brown*, 43 Pa. St. 9, 12.

¹ Wharton on Evid., vol. 1, § 711, and authorities cited; *Spear v. Bone*, cited *Mudd v. Suckermore*, 5 A. & E. 703; *Beaumont v. Perkins*, 1 Philim. 78.

² See the remarks of Patteson, J., in *Mudd v. Suckermore*, 5 A. & E. 703, 709. See, also, *Hayes' Case*, 10 How. St. Tr. 312; *Buller's Nisi*, p. 236;

Rex v. Crosby, 12 Mod., No. 72; *Seven Bishops' Case*, 12 How. St. Tr. 183, 306; *More v. Wood*, 14 East, 327; *Brune v. Rawlings*, 7 id. 279, 282; *Revett v. Braham*, 4 T. R. 497; *Tilman v. Traver*, *Moody & Ryan*, 141; *Allport v. Meek*, 4 C. & P. 267; *Griffith v. Williams*, 1 M. & R. 133, for the earlier cases.

³ 17 and 18 Vict., ch. 125, § 27.

ion, which, together with the document, shall then be submitted to the jury.¹

In other states the common-law rule is adhered to, and while comparison, both by expert witnesses and by the jury, is permitted, it must be made with writings which are relevant to the case, or, if with other writings, their authenticity must have been admitted either expressly or by conduct sufficient to estop the party.²

In the courts of other states, and in the United States supreme court, no irrelevant writing can be selected as a standard of comparison. Comparison can only be made with some writing properly constituting a part of the evidence or record and the genuineness of which is acknowledged.³

¹ *Mortimer v. Chambers*, 17 N. Y. S. 552; *Durnell v. Sowden* (Utah), 14 Pac. Rep. 335; *State v. Henderson*, 29 W. Va. 147; *Smith v. Caswell*, 67 Tex. 567; *Clay v. Alderson*, 10 id. 49; *Boggus v. State*, 34 Ga. 375; *Hammond v. Wolf* (Iowa, 1892), 42 N. W. Rep. 778; *Baker v. Mygatt*, 14 Iowa, 131; *Le Carpentier v. Delery*, 4 Mart. (La.) 454; *State v. Zimmerman*, 47 Kan. 243; *Yeomans v. Petty*, 40 N. J. Eq. 495; *Peck v. Callahan*, 95 N. Y. 73; *McKay v. Lasher*, 42 Hun, 270; *Winnie v. Tousley*, 36 Hun, 190; *State v. Miller*, 47 Wis. 530; *Smith v. Elmert*, 47 Wis. 479; *Hall v. Van Vranken*, 64 How. Pr. 407; *Marshall v. Hancock*, 80 Cal. 82; *Holmes v. Goldsmith*, 145 U. S. 150.

² *Hazzard v. Vickory*, 78 Ind. 64; *Short v. Kinzie*, 80 Ind. 500; *Thomas v. State*, 103 Ind. 419; *Rogers v. Tyley* (Ill., 1893), 32 N. E. Rep. 393; *Morrison v. Porter*, 35 Minn. 425; *Springer v. Hall*, 83 Mo. 93; *Bank v. Robert*, 41 Mich. 709; *Dietz v. Fourth Nat. Bank* (Mich.), 37 N. W. Rep. 220; *People v. Parker*, 34 N. W. Rep. 720; *State v. Henderson*, 29 W. Va. 147; *Yates v. Yates*, 76 N. C. 142; *Lachance v. Loblein*, 15 Mo. App. 460; *Rose v. Bank*, 91 Mo. 399; *Wag-*

oner v. Ruply, 69 Tex. 700; *Walker v. State*, 14 Tex. App. 609; *Chester v. State*, 23 Tex. App. 577; *State v. De Groff* (N. C., 1893), 18 S. E. Rep. 507; *Andrews v. Hayden* (Ky.), 11 S. W. Rep. 428. If the writing in dispute has been lost, an expert who has seen it may compare it with a relevant writing. *Abbott v. Coleman*, 22 Kan. 250. *Cf. Collins v. Ball*, 82 Tex. 259.

³ *Snyder v. Berkes* (Ala.), 4 S. W. Rep. 225; *Bestor v. Roberts*, 58 Ala. 331; *Clark v. Rhoades*, 2 Heisk. (Tenn.) 206; *Wilbur v. Eicholtz*, 5 Col. 240; *Bank v. Lierman*, 5 Neb. 247; *Miller v. Jones*, 32 Ark. 337; *Brobston v. Cahill*, 64 Ill. 356; *Woodard v. Spiller*, 1 Dana (Ky.), 180; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Miller v. Johnston*, 27 Md. 6; *Moore v. United States*, 91 U. S. 270; *Merritt v. Straw*, 33 N. E. Rep. 657; *Bank v. Houghton*, 41 Mich. 709; *Himrod v. Bolton*, 44 Ill. App. 516. It has been recently held that handwriting cannot be proved by comparison, in *Gibson v. Trowbridge* (Ala., 1893), 11 S. Rep. 365; *Riggs v. Powell* (Ga., 1893), 32 N. E. Rep. 482; *Bevan v. Bank*, 31 N. E. Rep. 679; 39 Ill. App. 577.

A writing intended to be used as a standard must be proved or admitted to be genuine to the satisfaction of the judge. The matter is one lying largely in his discretion, and his action should not be reversed unless he has committed some manifest error of law or unless his finding is totally unsupported by the evidence adduced.¹ Where the standard of comparison is an irrelevant writing and its genuineness is disputed, it must be proved directly by the evidence of witnesses who can testify of their own knowledge that it is genuine.²

In those courts which permit a comparison with irrelevant writings, expert testimony is always admissible. So attorneys at law,³ business men with extensive correspondence,⁴ bank officials,⁵ conveyancers,⁶ book-keepers,⁷ public officials,⁸ writing teachers,⁹ and other persons who from their position or profession have a peculiar knowledge of the subject, may testify.¹

In many cases, particularly in those states where comparison is not permitted with irrelevant writings, it has been held that the testimony of experts upon handwriting is not ad-

¹ *State v. De Graff* (N. C., 1894), 18 S. E. Rep. 507; *Hyde v. Woolfolk*, 1 Iowa, 159; *Wilson v. Irish*, 62 id. 260; *Tyler v. Todd*, 36 Conn. 218; *Thompson v. State* (Me.), 13 Atl. Rep. 892; *Com. v. Coe*, 115 Mass. 481; *People v. Cline*, 44 Mich. 290; *Conrad v. Bank*, 10 Mart. 700; *Hall v. Van Vranken*, 64 How. Pr. 407; *Depue v. Place*, 7 Pa. St. 428; *Rowell v. Fuller*, 59 Vt. 688. Cf. *Carter v. Jackson*, 58 N. H. 156; *State v. Hastings*, 53 N. H. 452.

² *Pavey v. Pavey*, 30 Ohio St. 600; *Baker v. Haines*, 6 Whart. (Pa.) 284. Cf. *Bell v. Brewster*, 44 Ohio, 690, and *Sweigart v. Richard*, 8 Barr (Pa.), 436, where comparison is to be made with writings over thirty years old.

³ *State v. Phair*, 48 Vt. 366.

⁴ *Ort v. Fowler*, 31 Kan. 478; *Kennedy v. Upshaw*, 66 Tex. 442, 446.

⁵ *Lyon v. Lyman*, 9 Conn. 55; Du-

bois v. Baker, 30 N. Y. 355; *Walker v. State*, 14 Tex. App. 609.

⁶ *Vinton v. Peck*, 14 Mich. 287.

⁷ *State v. De Graff* (N. C., 1894), 18 S. E. Rep. 507; *State v. Ward*, 39 Vt. 225; *Vinton v. Peck*, *supra*.

⁸ *Eisfield v. Dill et al.*, 71 Iowa, 442; *State v. De Graff* (N. C., 1894), 18 S. E. Rep. 507; *State v. Phair*, 48 Vt. 366.

⁹ *Eisfield v. Dill*, 7 Iowa, 442; *Moody v. Rowell*, 17 Pick. 450; *Bacon v. Williams*, 13 Gray, 525.

¹ *Edmonston v. Henry*, 45 Mo. App. 346; *Com. v. Williams*, 105 Mass. 62; *Sweetzer v. Lowell*, 33 Me. 446, 450; *Goldstein v. Black*, 50 Cal. 462, 465; *Hyde v. Woolfolk*, 1 Iowa, 159; *Murphy v. Hagerman*, *Wright* (Ohio), 293, 297; *Winch v. Norman*, 65 Iowa, 186; *Ort v. Fowler*, 31 Kan. 478; *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112; 51 N. W. Rep. 183.

missible and comparison is generally to be made by the court or jury.¹

§ 141. To what expert may give evidence.—An expert may testify to the characteristics of the handwriting; as, for example, that it is cramped or crowded,² or natural and free as distinguished from stiff, artificial and seemingly copied,³ as to the condition of the paper,⁴ whether two writings are by the same person,⁵ or as to the slant⁶ or other peculiarity of the letters,⁷ as to the size, length and position of signatures;⁸ and he may give his opinion upon the question whether writings were or were not written at the same time by the same person and with the same writing materials.⁹

An expert may testify to the character of alterations and erasures and may give his opinion as to their date and the means by which they were effected.¹⁰

¹ *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257, 264; *Kernin v. Hill*, 37 Ill. 209; *Fee v. Taylor*, 83 Ky. 259; *Tome v. Railroad Co.*, 39 Md. 37; *Gitchell v. Ryan*, 24 Ill. App. 372; *In re Rockey's Estate*, 155 Pa. St. 453; 26 Atl. Rep. 656; 32 W. N. C. 434; *Tucker v. Kellogg* (Utah, 1892), 28 Pac. Rep. 870; *State v. Zimmerman*, 47 Kan. 242.

² *Dubois v. Baker*, 30 N. Y. 355.

³ *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Ludlow v. Warshing*, 108 N. Y. 520; *Cox v. Dill*, 85 Ind. 334; *Goodyear v. Vosburgh*, 63 Barb. 154; *Wither v. Roe*, 45 Me. 571.

⁴ *Hancock v. O'Rourke*, 6 N. Y. S. 549.

⁵ *Rogers v. Tyler* (Ill., 1893), 32 N. E. Rep. 393. See upon the subject of expert evidence, *post*, §§ 185-198.

⁶ *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154.

⁷ *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209, 223.

⁸ *Riordan v. Guggerty*, 39 N. W. Rep. 107.

⁹ *Bank v. Holls*, 11 Gray (Mass.), 250; *Vinton v. Peck*, 14 Mich. 287;

Bank v. Young, 36 Iowa, 44; *Sheldon v. Warner*, 45 Mich. 638; *Reese v. Reese*, 90 Pa. St. 89; *Ellingwood v. Bragg*, 52 N. H. 488; *Clark v. Bruce*, 12 Hun, 271; *Dubois v. Baker*, 30 N. Y. 355; *Fulton v. Hood*, 34 Pa. St. 365. An expert may be permitted to use a black-board (*Dryer v. Brown*, 52 Hun, 391), and as the correctness of his opinion may usually be thus peculiarly demonstrated, his evidence is of little weight, it seems, if he neglects to do so. *In re Gordon* (N. J., 1893), 26 Atl. Rep. 268. See § 197.

¹⁰ *Kruse v. Chester*, 66 Cal. 353; *Dubois v. Baker*, 30 N. Y. 355; *Hankins v. Grimes*, 13 B. Mon. (Ky.) 257-264; *Ballentine v. White*, 77 Pa. St. 20-22; *Eisfield v. Dill*, 71 Iowa, 442; *Pate v. People*, 8 Ill. 644; *Moye v. Hoydun*, 30 Miss. 110; *Vinton v. Peck*, 14 Mich. 287; *Edelin v. Sanders*, 8 Md. 118. See as to alteration, §§ 128, 129. If the date stated in the writing is obscure an expert may give an opinion as to the real date (*Stone v. Hubbard*, 7 Cush. 595), or he may testify to the age of the in-

, In a prosecution for homicide, where the identity of the prisoner is in issue, the signature of the accused may be compared with writings proved to have been written by the slayer, or various writings alleged to have been written by him may be compared with each other by an expert or in some cases by the jury.¹

§ 142. **Proof of exhibits in equity.**—An exhibit, using the word in its general sense, means a document produced and identified for use as evidence.¹ In its restricted sense it signifies writings which are proved in chancery either by the express admissions of the parties in the pleadings, or by failing to deny their existence when alleged, or by *viva voce* examination of witnesses at the hearing.² So also when writings are put in evidence before a referee, before a jury in open court, or before a commissioner or examiner appointed to take testimony in chancery, they should be exhibited to the witness and examiner or referee to be identified by the witness, after which they should be marked as exhibits by the proper official.³ In modern chancery practice certain classes of documents, among which are included ancient records and deeds, public records, and deeds, bonds, notes, bills of exchange, letters and receipts, may be proved as exhibits at the hearing after answer before the chancellor,⁴ by any witness who can testify to their execution, identity or their accuracy as copies of an original.

Usually a party who wishes to prove an exhibit on a hearing must obtain an order to that effect,⁵ though his adversary has no right to an inspection of the writing prior to the hearing.⁶

strument. *Eisfield v. Dill*, 71 Iowa, 442; *Clark v. Bruce*, 12 Hun, 171. *Contra*, *Cheney v. Dunlap*, 20 Neb. 265.

¹ *Crist v. State*, 21 Ala. 137; *Early v. State*, 9 Tex. App. 476; *Bell v. Brewster*, 44 Ohio St. 690; 10 N. E. Rep. 679.

¹ Abb. Law Dict.

² *Gresley, Eq. Evid.*, 146.

³ Abb. Law Dict.; *Com. Bank v.*

Bank of State of N. Y., 4 Hill (N. Y.), 516.

⁴ *Daniell's Ch. Pr.* (5th Am. ed.) 881, 882; *Chalk v. Raine*, 7 Hare, 393; *Gresley, Eq. Evid.*, 188.

⁵ *Barrow v. Rhinelanders*, 1 Johns. Ch. (N. Y.) 559; *Miller v. Avery*, 2 Barb. Ch. 582.

⁶ *Lord v. Colvin*, 2 De G., M. & G. 47.

CHAPTER XIII.

JUDICIAL AND OTHER PUBLIC RECORDS.

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| <p>§ 142a. Inspection of public records.</p> <p>142b. Proof of executive and legislative acts and writings.</p> <p>142c. Proof of public non-judicial records.</p> <p>143. Proof of foreign laws.</p> <p>143a. Proof of municipal ordinances.</p> <p>144. Effect of public documents as evidence.</p> <p>145. Historical and scientific publications — Almanacs and newspapers.</p> <p>146. Proof of judicial records — General rule.</p> <p>147. Proof of records of courts of equity and of inferior courts.</p> <p>148. Proof of records of courts of other states.</p> <p>149. Proof of foreign judgments.</p> <p>150. Records of surrogate courts.</p> <p>150a. Proof of returns on writs.</p> | <p>§ 150b. The effect of judicial records as evidence.</p> <p>151. Effect of judgments on those in privity with the parties.</p> <p>152. Judgment must have been final and on the merits.</p> <p>153. Judgments conclusive only as to material facts in issue.</p> <p>154. Identity of cause of action required.</p> <p>155. Persons affected by judgments <i>in rem</i> and actions fixing personal status.</p> <p>156. Criminal judgments.</p> <p>157. Proof of judgments as facts and their use as proving ulterior facts distinguished.</p> <p>158. Validity and effect of foreign judgments.</p> <p>159. Judgments of sister states.</p> <p>160. Judgments in bar need not be pleaded.</p> |
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§ 142a. **Inspection of public records.**— From early times, both at common law and by statute, the right of the individual to inspect public records in so far as he had personal interest in them has been admitted.¹ In respect to judicial records of courts of a superior jurisdiction, an inspection may in the discretion of the court be compelled by *mandamus*, though the official having the custody of the papers is a party to the suit in which they are to be used.² But where a *mandamus* is desired to inspect the books of an inferior tribunal or official, it will generally be necessary for the applicant to show affirmatively that he has some personal interest in the

¹ *Scribner v. Chase*, 27 Ill. App. 36. *Fox v. Jones*, 7 B. & C. 732. *Cf.*

² *Rex v. Brangen*, 1 Leach Cr. Cas. *Colnen v. Orr*, 71 Cal. 43.
32; *Stone v. Crocker*, 24 Pick. 88;

document and that he intends to copy it for a proper purpose.¹

When, in order to give the right of appeal, officials must make a record of their action, they may be compelled to do so by *mandamus*,² and an official may be thus compelled to record a deed or file a paper,³ or to correct his records,⁴ or to affix a seal to a document.⁵ A public official may exercise reasonable discretion in making rules to be observed by those desiring to inspect the records of his office.⁶

In respect to the records of a private corporation, the same general principles are applicable. Such records, while public so far as its officials and stockholders⁷ are concerned, are private as regards other persons. A stranger having no interest in the corporation cannot obtain *mandamus* to compel an inspection of them.⁸ But a stockholder has a constitutional right to inspect the books of the corporation, though a refusal to permit him to do so is not ground for an action for damages;⁹ and a stockholder who is also a debtor to the corporation cannot obtain a *mandamus* to inspect its books as a stockholder to aid him in his capacity of debtor.¹⁰

¹ Hayes v. White, 66 Me. 305; State v. Hoblitzelle, 85 Me. 620; Stockman v. Brooks, 27 Pac. Rep. 746; Diamond M. Co. v. Powers, 51 Mich. 145; O'Hara v. King, 52 Ill. 303; Cormack v. Walcott, 17 Am. & Eng. Corp. Cases, 309; State v. Rachac, 37 Minn. 372.

² People v. Murray, 23 N. Y. S. 160; Bennett v. McCaffery, 28 Mo. App. 220; State v. Field, 37 id. 83; Warren Co. v. State, 15 Ind. 250.

³ Trinity v. Lane, 79 Tex. 643; United States v. Hall, 7 Mackey, 14; Willflange v. McCollom, 83 Ky. 361; People v. Collins, 7 Johns. 549; In re Goodell, 14 id. 325; Strong's Case, Kirby (Conn.), 345.

⁴ People v. Brooklyn, 7 N. Y. S. 327; State v. Clayton, 34 Mo. App. 563; Ellis v. Bristol, 2 Gray (Mass.), 370; Bower v. O'Brien, 2 Ind. 423; People v. Matterson, 17 Ill. 167.

⁵ Prescott v. Ganser, 34 Iowa, 175. See, also, Crew v. Saunders, 2 Str.

1005; Atherton v. Beard, 2 T. R. 610; Iasigi v. Brown, 1 Curt. C. C. 401.

⁶ Upton v. Catlin, 17 Colo. 546; State v. Long, 37 W. Va. 266; Atcherson v. Huebner, 90 Mich. 643.

⁷ State v. St. Louis & S. F. R. Co., 29 Mo. App. 301; State v. Sportsman P. & C. Ass'n, 28 id. 326; People v. United States Merc. Rep., 20 Abb. N. C. 192; People v. Paton, 20 id. 195. But cf. Appeal of Emp. Pass. R. R. Co., 19 Atl. Rep. 629; 26 W. N. C. 26.

⁸ State v. Bank, 1 Rob. (La.) 470; State v. May, 106 Mo. 488; Bank v. Hilliard, 5 Cowen, 419; 6 id. 62; State v. St. Louis & S. F. R. Co., 29 Mo. App. 301; Union Bank v. Knapp, 3 Pick. 96. Cf. United States v. Hull, 7 Mackey, 14.

⁹ Legendre v. New Orleans Brew. Co. (La., 1893), 12 S. Rep. 837.

¹⁰ Investment Co. v. Eldridge, 2 Pa. Dis. Ct. R. 304.

§ 142b. Proof of executive and legislative acts by documents.—The extent to which the public acts, seals, statutes, etc., of the various departments of the supreme government will be noticed having been fully explained elsewhere in this work,¹ no extended reference to the subject is necessary. When, however, it is deemed necessary to prove any public executive or other official act, it may be done *prima facie* by the production of a printed copy of a proclamation, or public notice or announcement, or by a newspaper, official gazette or other printed document containing an account thereof which was printed according to law under governmental control or authorization.²

The court will take judicial notice of the public statutory and common law prevalent in its own jurisdiction,³ though private statutes or resolutions must be proved. The custom of printing the legislative acts of congress and of the various state legislatures is now almost universal, and as the printing is done by persons under statutory authorization and subject to governmental control and supervision, no objection can be urged to admitting these printed statutes in evidence.

It is now the general rule, usually by judicial decision but frequently by express legislative enactment, that a book purporting to be printed by authority and to contain the statutory law may, if duly attested as prescribed by law, be read as the best evidence of any statutory law, public or private, domestic or foreign.⁴

§ 142c. Proof of public non-judicial records.—The entries in public registers or books of public record are entitled to a

¹ See *post*, §§ 240, 242.

² *Whiton v. Albany, etc. Co.*, 109 Mass. 24; *Fulham v. Howe*, 14 Atl. Rep. 652; 60 Vt. 351; *Larten v. Gilham*, 2 Ill. 577; *Young v. Bank*, 4 Cranch, 388; *People v. Wilson*, 62 Hun, 618; *Eld v. Gorham*, 20 Conn. 8; *Larkin v. Burlington, etc. Co.* (Iowa, 1892), 52 N. W. Rep. 490; *Clemens v. Myer*, 44 La. 390; 10 S. Rep. 797; *Lycett v. Wolff*, 45 Mo. App. 489 (printed copy of census).

³ See § 242.

⁴ *Watkins v. Holman*, 16 Pet. 25; *Pease v. Peck*, 18 How. 595; *Tennant v. Tennant*, 110 Pa. St. 484; *Falls v. United States Sav. S. & B. Co.* (Ala., 1893), 13 S. Rep. 25; *Leach v. Linde*, 24 N. Y. S. 176; *Chicago v. Tuite*, 44 Ill. App. 535; *Hawes v. State*, 88 Ala. 37; *Cochran v. Ward* (Ind., 1892), 29 N. E. Rep. 795. Cf. *Laidley v. Cummings*, 83 Ky. 806; *Fulham v. Howe*, 60 Vt. 351.

high degree of credibility as evidence though unauthenticated in court by the oath of the party who made them or in whose custody the books are kept. The general notoriety of the matters to which such entries relate, the public and official character of the books and of those who keep them, the fact that the entries are made by an officer who is under oath, that they are required or authorized to be made by law, or else are made in the usual course of official duty without any present motive to misrepresent, combine to give the evidence obtained from such sources peculiar force and value.

To give an official character to a public record or register it is not essential that it should have been authorized or ordered to be kept by statute.¹ It is the duty, if not the right, of every official to keep a record of his public transactions whenever such a practice is an appropriate and common mode of evidencing them. This record, whether required to be kept by statute or not, is a public record.² The books themselves, being produced from the proper custody, should be received in evidence without authentication,³ unless it is affirmatively shown that they have been negligently or illegally kept.⁴

It is obvious, however, that the actual production of public records in court will be very inconvenient, if not impossible, on account of their bulky character and of the constant use to which they are subjected. So their proper and legal custodian is the party who has made the entries.⁵ Upon these grounds, at common law and now generally by statute, the contents of books of public record, such as the records of the

¹ *United States v. Cross*, 20 D. C. 365; *Grafton v. Reed*, 34 W. Va. 172; *Downing v. Diaz*, 80 Tex. 436; 16 S. W. Rep. 49; *Simmons v. Spratt*, 20 Fla. 495. But *cf. contra*, *Hatchett v. Conner*, 30 Tex. 104; *Jacobi v. Order of Germania*, 26 N. Y. S. 318.

² *Succession of Short* (La., 1894), 14 S. Rep. 184; *Coleman v. Com.*, 25 Gratt. (Va.) 865; *Kyburg v. Perkins*, 6 Cal. 674; *Miller v. Indianapolis*, 123 Ind. 196; 24 N. E. Rep. 228; *Burton v. Tuite*, 80 Mich. 218; 44 N. W. Rep. 282.

³ *Pulley v. Hilton*, 12 Price, 625; *Oglesby v. Forman*, 77 Tex. 647; *Baillie v. Jackson*, 17 Eng. L. & Eq. 131.

⁴ *Walker v. Wingfield*, 18 Ves. 443; *Loving v. Warren Co.*, 14 Bush (Ky.), 316; *Sanger v. Merritt*, 120 N. Y. 114; *Chamberlain v. Bailly*, 101 Mass. 188; *Butler v. L. Ins. Co.*, 45 Iowa, 93; *Springs v. Schenck*, 106 N. C. 153.

⁵ "The carrying of original papers from one court to another is to be disapproved." *Rogers v. Tillman*, 72 Ga. 479.

navy¹ or treasury department,² county records and parish registers,³ public assessment rolls,⁴ postoffice, custom-house⁵ and land-office records,⁶ registers of vital statistics,⁷ registers of deeds,⁸ of mechanics' liens⁹ and of leases of public lands,¹⁰ may be proved by an examined copy properly sworn to by the party making it, or by a transcript properly verified and certified by the official whose duty it is to keep the original.¹¹

If the form of the certificate is prescribed by statute, the legal requirements must be substantially complied with, though immaterial inaccuracies or informalities may be disregarded.¹² Thus, where the official character of the certificate is apparent upon its face, it is not required that it shall state that it is a

¹ *Maurice v. Warden*, 57 Md. 510.

² *Mott v. Ramsay*, 92 N. C. 152; *United States v. Bell*, 111 U. S. 477.

³ *Hall v. Aitkin*, 25 Neb. 360.

⁴ *Clark v. Fairly*, 30 Mo. App. 335.

⁵ *State v. Loughlin*, 20 Atl. Rep. 88.

⁶ *Stevenson v. Reeves*, 8 S. Rep. 695; *Niche v. Earle*, 117 Ind. 270.

⁷ *Shutesbury v. Hadley*, 133 Mass.

242; *Tucker v. People*, 117 Ill. 91.

⁸ *Chamberlain v. Brasley*, 101 Mass. 88.

⁹ *Consaul v. Sheldon*, 35 Neb. 247.

¹⁰ *Emmett v. Lee* (Ohio, 1894), 35 N. E. Rep. 794.

¹¹ *Stone Cattle & Past. Co. v. Boon*, 73 Tex. 158; *Buck v. Gage*, 27 Neb. 306; 43 N. W. Rep. 110; *New England, etc. Co. v. Farmington, etc. Co.*, 8 U. S. 229; *Simmons v. Spratt*, 20 Fla. 495; *Consaul v. Sheldon*, 35 Neb. 247; *Bryan v. Wear*, 4 Mo. 106; *Owings v. Speed*, 5 Wheat. 420; *Ronkendorf v. Taylor*, 4 Pet. 349, 360; *Sawyer v. Baldwin*, 11 Pick. 494; *United States v. Johns*, 4 Dall. 412, 415; *Jackson v. Boneham*, 15 Johns. 226; *Ray v. Stewart*, 105 N. C. 472; *Fruin-Bambrick Co. v. Geist*, 37 Mo. App. 509; *Wiley v. Inhabitants*, 150 Mass. 426; *Thrasher v. Ballard*, 33 W. Va. 285; *Thurston v. Luce*, 61 Mich. 292; *Bell v. Kendrick* (Fla.,

1890), 6 S. Rep. 868; *Liddon v. Hodnett*, 22 Fla. 442; *Lagow v. Glover*, 77 Tex. 448; *Emanuel v. Gates*, 53 Fed. Rep. 772; *Tillotson v. Weber* (Mich., 1893), 53 N. W. Rep. 837; *Lamar v. Pearse* (Ga., 1893), 17 S. E. Rep. 92. *Cf.* *State v. Cake*, 24 N. J. L. 516.

¹² *Mackey v. Balt. etc. Co.*, 19 D. C. 282; *Collins v. Ball*, 82 Tex. 259; *Dawson v. Parham*, 55 Ark. 286; *Saxton v. Nimms*, 14 Mass. 320; *Sanger v. Merritt*, 120 N. Y. 114; *Goodwin v. Jack*, 62 Me. 416; *Cofer v. Schening* (Ala., 1893), 13 S. Rep. 123; *State v. Hendrix*, 98 Mo. 374; *Gunn v. Peakes*, 36 Minn. 177; *Bean v. Loryea*, 81 Cal. 51. A deputy may certify in the name of the legal custodian of the record (*Hague v. Porter*, 45 Ill. 318; *Triplett v. Gill*, 7 J. J. Marsh. 433; *Grant v. Levan*, 4 Pa. St. 393; *Greasons v. Davies*, 9 Iowa, 219), though not in his own name. *Snyder v. Brown*, 4 Watts (Pa.), 132. The signature of the keeper of the record certifying thereto need not be proved. *Floyd v. Ricks*, 14 Ark. 286. But its forgery may, on the other hand, be shown. *Prather v. Johnson*, 3 Har. & J. (Md.) 487; *Bryan v. Wear*, 4 Mo. 106.

true copy of an official document or record.¹ Where by statute it is required that certain private writings must be recorded, they are then regarded as public records, and it is often enacted that such records or exemplified or certified copies thereof may be introduced as original evidence without further proof.² A copy of a record of a conveyance made when deeds were required to be stamped is not inadmissible as evidence because it does not show that the original was stamped.³ But a deed is not admissible without proof under such a statute where the fact in issue is the forgery of the original.⁴

§ 143. Proof of foreign laws.—As the courts refuse to take judicial notice of foreign laws⁵ it is always necessary to prove them as facts before they can be applied to the facts in issue. This is now customarily done in the case of a statute by reading it from a printed book or copy purporting to contain the statute in question, and duly attested as a true copy by the supreme authority of the foreign government, usually under its seal, or otherwise proved to have been published by or under proper authority or to have been received as proof of the law in the courts of the foreign state.⁶ Whether the foreign statute has been satisfactorily proved is a question for the jury alone; but where the proof of a foreign law consists wholly of documentary evidence, the construction and legal effect of this evidence are wholly within the exclusive province of the court.⁷ It has been held that a consul's certificate under

¹ *Darcy v. McCarthy*, 35 Kan. 722; *Collins v. Valleau* (Iowa, 1889), 43 N. W. Rep. 284.

² See *ante*, §§ 134–136; How. Stat. Mich., § 5685; Iowa Code, § 3702; Gen. Stat. Ind. 1881, § 462; *Bradley v. Silsbee*, 33 Mich. 328; *Cox v. Jones*, 52 Ga. 438. *Cf. contra*, as to a certificate of adoption, *McCollister v. Yard* (Iowa, 1894), 57 N. W. Rep. 447.

³ *Collins v. Valleau* (Iowa, 1889), 43 N. W. Rep. 284.

⁴ *People v. Swetland*, 77 Mich. 33; 43 N. W. Rep. 779.

⁵ See *post*, § 242.

⁶ See § 143*a*; *Ennis v. Smith*, 14 How.

426; *Pierce v. Indseth*, 106 U. S. 551; *Spaulding v. Vincent*, 24 Vt. 501; *Church v. Hubbard*, 2 Cranch, 238; *Lincoln v. Battelle*, 6 Wend. 475; *Packard v. Hill*, 2 id. 411; *Charlotte v. Chouteau*, 33 Mo. 194; *Owen v. Boyle*, 15 Me. 147.

⁷ *Ennis v. Smith*, 14 How. (U. S.) 400 (Code Civil of France); *Gibson v. Manuf. Co.*, 144 Mass. 83; *McCormick v. Garrett*, 5 De G., M. & G. 278; *Ufford v. Spaulding*, 156 Mass. 65; *Kennard v. Kennard*, 63 N. H. 308; *Insurance Co. v. Wright*, 60 Vt. 522; *Alexander v. Penn. etc. Co.*, 48 Ohio St. 623; *Hawes v. State*, 88 Ala. 37.

seal that the book was authorized or recognized as an authority is not enough as proof.¹

Under the rule that the evidence of experts is admissible in matters concerning which they have peculiar knowledge or skill,² witnesses who are learned in the statutory³ and common law of a country will be permitted to testify to their knowledge or opinion of what that law is.⁴ Foreign unwritten laws, usages and customs may be ordinarily, and necessarily must be from the circumstances of the case often proved by such evidence.⁵ And such persons may refresh their memory by reading from text-books of authority and from reports of the decisions of foreign courts, and may perhaps read these authorities to the jury,⁶ provided the witness is willing to swear that the books are admitted as authorities by the courts of the country in question.⁷

The witness will be required to be an advocate or official who has had actual practice in the courts of the country

¹ Church v. Hubbard, 2 Cranch, 187, 236.

² See *post*, §§ 185-198.

³ Church v. Hubbard, 2 Cranch, 237.

⁴ Ennis v. Smith, 14 How. 426; Baron De Bode v. Reginam, 10 Jur. 217; The Poweshiek, 2 Low. 142; Barrows v. Dowris, 9 R. I. 446; Holls v. Van Alstyne, 20 Ill. 202; Roberts' Will, 8 Paige, 446; Pierce v. Indseth, 106 U. S. 555.

⁵ Dalrymple v. Dalrymple, 2 Hagg. 115-144; Dickerson v. Matheson, 50 Fed. Rep. 78; Talbot v. Seaman, 1 Cranch, 12-38; Denison v. Hyde, 6 Conn. 508; Brackett v. Norton, 4 Conn. 517; Kline v. Baker, 99 Mass. 253; Carnegie v. Morrison, 2 Met. 404; Haven v. Foster, 9 Pick. 130; Bagley v. Francis, 14 Mass. 453; Lincoln v. Battell, 6 Wend. 432; Francis v. Ocean Ins. Co., 6 Cowen, 429; Dyer v. Smith, 12 Conn. 384; Brush v. Wilkins, 4 Johns. Ch. 520; State v. May Look, 7 Oreg. 54; Hall v. Costello, 48 N. H. 176; Kennard v. Ken-

nard, 63 id. 308; Amer. L. Ins. Co. v. Rosenagle, 77 Pa. St. 507.

⁶ See *post*, § 145.

⁷ Barrows v. Downs, 9 R. I. 4461; Crogin v. Lamkin, 7 Allen, 395; Penobscot Co. v. Bartlett, 12 Gray, 244; Arne v. McCamber, 124 Mass. 90; Rayment v. Colter, 3 Pick. 293, 296; Brush v. Scribner, 11 Conn. 407; Lattimer v. Eglin, 4 Desaus. 26, 32. Chancellor Kent, in speaking of the sources of knowledge of the common law, uses the following language: "The best evidence of the common law is to be found in the decisions of the courts of justice contained in the numerous volumes of reports which crowd the lawyer's library, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law." 1 Com. 440.

whose law he is called upon to prove.¹ Thus, a Roman Catholic bishop may testify to the law of his church,² a student in a university to the law of Germany,³ and a French consul to the law of France.⁴

The states of the Union are so far foreign to each other that the rule stated as defining the mode of proving foreign laws, both statute and unwritten, is generally applicable to them. In many of them by statute, the statute law of another state may now be proved by reading the same from a printed volume which upon its face purports to contain the law of that state.⁵

§ 143a. **Municipal ordinances.**—In the absence of statutory provision regulating the proof of ordinances, the proper evidence of their existence and contents is the original record containing the ordinance itself,⁶ or a copy properly certified or otherwise authenticated by the official having charge of them.⁷ Usually, however, it is enacted by the charter or a

¹ See *post*, § 185, as to experts; *In re Bonelli*, L. R. 1 Prob. Div. 69; *Cartwright v. Cartwright*, 26 W. R. 684; *Kennard v. Kennard*, 63 N. H. 308. Cf. *Donkt v. Thelluson*, 8 C. B. 812.

² *Sussex Peerage Case*, 11 C. & F. 134.

³ *Bristow v. Sequeville*, L. R. 5 Exch. 275.

⁴ *Lacon v. Higgins*, 3 Stark. 178. See *Story on Conf. of Laws*, §§ 641, 642, and the earlier cases there cited.

⁵ *Mullen v. Morris*, 2 Pa. St. 85; *Hempstead v. Read*, 6 Conn. 480; *Hawes v. State*, 7 S. Rep. 302; 88 Ala. 37; *Falls v. United States Sav. Loan & Bldg. Soc.* (Ala., 1893), 13 S. Rep. 25; *Tennant v. Tennant*, 110 Pa. St. 478; 1 Atl. Rep. 532; *Leach v. Linde*, 24 N. Y. S. 176; *Kean v. Rice*, 12 S. & R. 203; *Greasens v. Davis*, 9 Iowa, 219; *Raynham v. Canton*, 3 Pick. 293. Under a statute rendering admissible printed decisions of the courts of a foreign state, dissenting

opinions are not admissible. *Chicago, etc. Co. v. Tuite*, 44 Ill. App. 535.

⁶ *Railroad Co. v. Johnson* (Ga., 1893), 16 S. E. Rep. 49.

⁷ See *post*, § 242; *City v. Dunn*, 1 McCord (S. C.), 333; *Metrop. St. R. Co. v. Johnson* (Ga., 1893), 16 S. E. Rep. 49; *Louisville, etc. Co. v. Shires*, 108 Ill. 617; *Baily v. State* (Neb., 1890), 47 N. W. Rep. 208; *Pugh v. Little Rock*, 35 Ark. 75; *Black v. Jacksonville*, 36 Ill. 301; *Fitch v. Pinckard*, 5 Ill. 78; *Chicago v. Engle*, 76 id. 317. The written records of the corporation purporting to contain the ordinances, coming from the custody of the town clerk and properly identified as a municipal record, have been received to prove ordinances: *People v. Wilson*, 62 Hun, 612; *Barnes v. City*, 89 Ala. 602; *Tipton v. Norman*, 72 Mo. 380; *Ottumwa v. Schaub*, 52 Iowa, 515; *Stewart v. Clinton*, 79 Mo. 604; *Eichenlaub v. St. Joseph* (Mo., 1893), 21 S. W. Rep. 8.

general statute that an ordinance may be proved by reading it from a printed volume published under municipal authority and purporting to contain the municipal by-laws. Where this is the case, the method of proving ordinances assimilates closely to that employed in proving foreign or private statutes and the same principles of law are applicable.¹

Proof of the power to enact the ordinance may be required;² and if by statute certain formalities, such as an adoption by a majority vote, recording in books kept for the purpose, signature by the mayor or publication are prescribed as necessary to its validity, strict compliance therewith must be shown.³ Where objection is not made prior to the reception of the ordinance in evidence, it will be presumed that it was properly enacted.⁴ A compliance with such statutory requirements must ordinarily be proved by the journal of the municipal council,⁵ though it has been held that, where the record was silent, the fact that an ordinance had been signed could be proved by the parol evidence of the official whose duty it was to sign ordinances.⁶

A sworn certificate of the publisher of a newspaper in which an ordinance was published is satisfactory evidence of publication,⁷ though it has been held, in the absence of statute,

¹ *Barr v. Auburn*, 89 Ill. 361; *State v. King*, 37 Iowa, 462; *Napman v. People*, 19 Mich. 352; *Independence v. Trouville*, 15 Kan. 70; *Lindsay v. Chicago*, 115 Ill. 120; *Prell v. McDonald*, 7 Kan. 446; *Holly v. Bennett*, 46 Minn. 386. See, also, *ante*, § 143. Where a written or printed copy of an ordinance is known to exist, the ordinance cannot be proved by parol evidence, but the writing itself must be produced as the best evidence. *Stewart v. Clinton*, 79 Mo. 604; *Baker v. Scofield*, 58 Ga. 182.

² *Elizabethtown v. Lefler*, 23 Ill. 90.

³ *Schott v. People*, 89 Ill. 195; *Larkin v. Railroad Co.* (Iowa, 1892), 53 N. W. Rep. 480; *Willard v. Killingworth*, 8 Conn. 247; *Raker v. Maquon*, 9 Ill. App. 155; *National Bank of Commerce v. Town of Grenada*,

48 Fed. Rep. 278; 54 Fed. Rep. 100; *Heller v. City of Alvarado*, 20 S. W. Rep. 1003; 1 Tex. Civ. App. 409; *Seattle v. Doran*, 5 Wash. St. 482; *Whitney v. Port Huron*, 50 N. W. Rep. 316; 88 Mich. 268; *Hutchison v. Mount Vernon*, 40 Ill. App. 19.

⁴ *Flora v. Lee*, 5 Ill. App. 629.

⁵ *Lexington v. Headley*, 5 Bush (Ky.), 508; *Bank v. Grenada*, 54 Fed. Rep. 100; *Ball v. Fagg*, 67 Mo. 481; *Covington v. Ludlow*, 1 Metc. (Ky.) 295; *People v. Murray*, 57 Mich. 396; *Solomon v. Hughes*, 24 Kan. 211.

⁶ *Knight v. Kans. etc. Co.*, 70 Mo. 231.

⁷ See *post*, § 145; *Albia v. O'Hara*, 64 Iowa, 297; *Kettering v. Jacksonville*, 50 Ill. 39; *Schwartz v. Oshkosh*, 55 Wis. 490.

that publication may be shown by the evidence of a person who saw a copy of the ordinance posted in some conspicuous public place.¹ But such a method of publication will not be valid if publication in a newspaper is required by statute, or if a newspaper is published in the town and publication could have readily been made therein.²

In conformity with the rule of construction that a statute or written law has no legal existence except in the language in which it was enacted, an ordinance which is required to be published in a German paper must be printed in English where there is no express statutory provision to the contrary.³

§ 144. **Effect of public documents as evidence.**—The principles upon which a certified copy of a public writing is admissible as primary evidence of the record are identical with those which have been explained⁴ as regulating the admission of the entries of third parties when constituting a part of the *res gestæ*. The credibility of private and public entries is based upon the same considerations, namely, that they were made by a party whose duty it was to make them, who had competent knowledge of the subject-matter, that they are relevant, and are within the scope of official, professional or private employment. The production of the books themselves is necessary as the best evidence of private entries. They do not purport *prima facie* to be authentic,⁵ but their original character and correctness must be proved by an oath of the person who made them, or, if he cannot be produced, by the evidence of some other competent witness.⁶

As respects copies of public writings certified to by public officials, it may be said that they are evidence of all the facts they contain.⁷ But a record is not evidence of any fact

¹ *Newhan v. Aurora*, 14 Ill. 364; *v. Keen*, 18 Wall. (U. S.) 342; *Whitcher Teft v. Size*, 10 id. 432; *Eldora v. v. McLaughlin*, 115 Mass. 167; *Erwin Burkingame*, 62 Iowa, 32. *v. English*, 61 Conn. 502; *Hancock v. Flynn*, 8 N. Y. S. 133; *White v. Whitney*, 83 Cal. 163.

² *Raker v. Maquon*, 9 Ill. App. 155.

³ *State v. City of Orange*, 22 Atl. Rep. 804; 54 N. J. L. 111.

⁴ §§ 58-61.

⁵ *Bradley v. Silsbee*, 33 Mich. 328.

⁶ *Chenango Bank v. Lewis*, 63 Barb. 111; *State v. Phair*, 48 Vt. 366; *Culver v. Marks*, 122 Ind. 554; *Mulhall*

⁷ *Falls Ld. Co. v. Chisolm* (Tex., 1888), 9 S. W. Rep. 479; *Bingham v. Cabot*, 3 Dall. 19, 23, 39-41; *Radcliff v. Insurance Co.*, 7 Johns. 38, 51; *Spangler v. Jacoby*, 14 Ill. 299; *Root v. King*, 7 Cowen, 617; *Darcy v. Mc-*

not required to be recorded by the officer who has made the entry.¹ Thus, a marriage register, while admissible to prove the fact and date of the marriage, cannot be used to show the age of either contracting party.² Nor is a certificate of baptism admissible to prove a person's age or place of birth, though his age may be mentioned in it.³ The date and fact of the commitment or discharge of a prisoner may be shown by the prison records,⁴ and records of municipal corporations and official boards are generally admissible to prove official and municipal acts required to be recorded.⁵ The registry of a ship, being a local and municipal requirement, is not recognized by international law as evidence of the facts which it contains. It is only admissible as evidence of ownership when corroborated by circumstances which will render it equivalent to an admission,⁶ for a legal and nominal ownership is consistent with one equitable and real in some other person. For this reason a register is never evidence in favor of a person claiming ownership.⁷ Log-books when required

Carthy, 35 Kan. 722 (copy of letter of receiver of land office). The writing, whether public or private, should be confined to those facts which are desired to be proved by the party, and his adversary cannot be allowed to treat the documents as evidence for all purposes and use them on cross-examination for other objects. *Close v. Stuyvesant* (Ill., 1890), 24 N. E. Rep. 868; *Erie & Pac. Des. v. Stanley*, 123 Ill. 158; 14 N. E. Rep. 212; *Murray v. Suen*, 41 La. Ann. 1109; 7 S. Rep. 126.

¹ *McGuirk v. Mut. Ben. Life Ins. Co.*, 20 N. Y. S. 908; 66 Hun, 628; *Berry v. Hull* (N. M., 1893), 30 Pac. Rep. 36; *Durfee v. Abbott*, 61 Mich. 471; *Lavin v. Mutual Aid Society*, 74 Wis. 349; *Hunt v. Chosen Friends*, 64 Mich. 671; *Carrington v. Potter*, 37 Fed. Rep. 767; *Hall v. Aitken*, 25 Neb. 360; *Brundred v. Del Hoyo*, 20 N. J. L. 328; *Fitler v. Shotwell*, 7 Watts & S. 14; *Evanston v. Gunn*, 99

U. S. 660 (signal service record); *The Maria*, 32 L. J. Adm. 163.

² *Doe v. Barnes*, 1 M. & R. 386, 389.

³ *Clark v. Trinity Church*, 5 Watts & Serg. 266; *Blackburn v. Crawford*, 8 Wall. 189; *Morrissey v. Ferry Co.*, 47 Mo. 521; *Derby v. Salem*, 30 Vt. 722.

⁴ *Rex v. Aickles*, 1 Lead. Cr. Cas. 435; *Salte v. Thomas*, 3 B. & P. 188. See *post*, §§ 341-345.

⁵ See *ante*, § 143a; *Worcester v. Northborough*, 140 Mass. 400; *Ronkendorf v. Taylor*, 4 Pet. 349; *Halleck v. Boylston*, 117 Mass. 469. *Contra*, *Buffalo L. T. & S. D. Co. v. Association* (N. Y., 1891), 27 N. E. Rep. 942.

⁶ *Merchants' N. Co. v. Amsden*, 25 Ill. App. 607.

⁷ *Bixby v. Franklin Ins. Co.*, 8 Pick. 86; *Rexford v. Snow*, 46 Hun, 570; *Tinkler v. Walpole*, 14 East, 226; *Weston v. Penniman*, 1 Mason, 306, 318; *Colsen v. Benzey*, 6 Greenl. (Me.) 474; *McIver v. Humble*, 16 East, 169, cited in 1 Greenl. on Ev., § 494.

by statute are admissible as public records to show *prima facie* the facts required to be recorded in them. Otherwise entries in log-books are mere private entries, depending for admissibility upon their character as admissions or as a part of the *res gestæ*.¹

§ 145. Historical and scientific books and publications — Almanacs and newspapers.— While the decisions are somewhat at variance, it may be said that books, maps or plans, or publications relating to historical or scientific subjects of widespread and general interest and notoriety which have, from long public and general use, become recognized authorities, will be received to prove facts treated therein.² Maps made by surveyors or published by governmental authority have sometimes been admitted as relevant evidence in case of disputed boundaries, or where distances between places are in question. If the map was published by legislative authority, it should be certified as authentic by the secretary of state or other proper official.³ Private maps and plats should be verified by the testimony of the surveyor who made them

¹The Hercules, 1 Sprague, 534; Orne v. Townsend, 4 Mason, 544; United States v. Gibert, 2 Sumn. 19; Abbott on Shipping, p. 468.

²Roderiquez v. State (Tex., 1893), 22 S. W. Rep. 978; Com. v. King, 150 Mass. 233; Polhill v. Brown, 84 Ga. 342 (Map); Washburn v. Cuddihy, 8 Gray, 430; Morris v. Hanner, 7 Pet. 504. Cf. Vaux Peerage, 5 C. & F. 538; Schell v. Plumb 55 N. Y. 592; Com. v. Wilson, 1 Gray, 337; Quackenbush v. Railroad Co., 35 N. W. Rep. 523; 73 Iowa, 458; Ashworth v. Kittredge, 12 Cush. 93; Smith v. Navasota, 72 Tex. 422; Worcester v. Northborough, 140 Mass. 397; Ming v. Foote, 23 Pac. Rep. 515. See article in 26 Am. Law Rev. 390. "Historical facts of general and public notoriety may be proved by reputation; and that may be established by historical works of known character and accuracy. But evidence of this sort is confined in a

great measure to ancient facts which do not presuppose better evidence, and where from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. The work of a living author who is within reach of process is not of this nature. He may be called as a witness and examined as to the sources and accuracy of his information." Story, J., in Morris v. Lessee of Harmer's Heirs, 7 Pet. 558; 1 Greenl. Evid., § 497; 1 Whart. Evid., §§ 338, 664.

³Nosler v. Railroad Co., 73 Iowa, 268; Armendiaz v. Stillman, 67 Tex. 458; 3 S. W. Rep. 678; Com. v. King, 150 Mass. 221; 22 N. E. Rep. 205; Polhill v. Brown, 84 Ga. 338; 10 S. E. Rep. 921; Donohue v. Whitney, 133 N. Y. 178; Ming v. Foote (Mont., 1890), 23 Pac. Rep. 513.

or by some other competent witness who will swear to their correctness.¹

In an action to recover for personal injuries or a wrongful death, life and mortality tables in general use are, if identified, admissible to show the expectation of life.² A newspaper may be received in evidence to prove facts which a statute provides shall be published in it, such, for example, as laws passed by the legislature, notices in legal proceedings, the formation and dissolution of a partnership, and the like.³ An almanac is admissible to show facts recorded therein, not strictly as evidence of such facts, but rather to refresh the memory of the court and jury, where they are such (*e. g.*, the rising and setting of the sun and moon) as courts are bound to notice judicially.⁴

§ 146. Proof of judicial records.—A judicial record is an accurate history of a suit from its origin to its termination, including the conclusion of law thereon, drawn up by the

- ¹ *Roe v. Strong*, 107 N. Y. 356; *son v. Whisivant*, 101 N. C. 645; 8 S. Com. v. Lurtzer, 19 Atl. Rep. 681; E. Rep. 126.
² *Richmond, etc. Co. v. Hissong* (Ala., 1893), 13 S. Rep. 209; 13 id. 130; *Morrison v. McAfee* (Oreg., 1893), 32 Pac. Rep. 400; *Greer v. Louisville, etc. Co.* (Ky., 1893), 21 S. W. Rep. 649; *Seagel v. Railroad Co.*, 83 Iowa, 380; *Steinbrunner v. Railroad Co.*, 146 Pa. St. 504.
³ See *ante*, §§ 141a, 143a, 150a. Price-currents have also been admitted to show the market value of merchandise. 1 Whart. Evid., §§ 671-675.
⁴ See §§ 237, 241; *Mobile, etc. Co. v. Ladd*, 9 S. Rep. 169; 92 Ala. 287; *Munshower v. State*, 55 Md. 11; *Sisson v. Railroad Co.*, 14 Mich. 497; *Kilgour v. Miles*, 6 G. & J. (Md.) 274; *People v. Cheekee*, 61 Cal. 404; *Reed v. Wilson*, 41 N. J. L. 29; *Finney v. Callendar*, 8 Minn. 41; *Brough v. Perkins*, 6 Mod. 81; *Sprowl v. Lawrence*, 33 Ala. 674; *Sascer v. Bank*, 4 Md. 420.
- 26 W. N. C. 46; *Donohue v. Whitney*, 133 N. Y. 178. As to the admissibility of field-notes of surveyors where questions of boundaries are involved, see *Holliday v. Maddox*, 39 Kan. 359; 18 Pac. Rep. 99; *Dugger v. Nickerson*, 100 N. C. 1; 6 S. E. Rep. 746. A map showing an ancient survey on which a more recent survey is based is not itself admissible to corroborate the later survey, though it may be relevant as evidence of reputation to contradict it. *Wyatt v. Duncan* (Tex., 1893), 22 S. W. Rep. 665. To prove the accuracy of a private survey, evidence that other surveys made by the same surveyor had been found correct is admissible. *Schunior v. Russell*, 83 Tex. 83. But where the accuracy of the map is not shown affirmatively, still it may be used by a surveyor in giving evidence to explain his testimony to the jury. *Griffith v. Rife*, 72 Tex. 185; 12 S. W. Rep. 168; *Dob-*

proper officer, for the purpose of perpetuating the exact state of the facts.¹ "Records are memorials or remembrances, in rolls of parchment, now paper, of the proceedings and acts of a court of justice, which hath power to hold pleas."² At common law a judicial record might be proved by the record itself, and this originally was the only manner of proof in a plea of *nul tiel record*.³ Records might also be proved by exemplified copies, or by duly authenticated copies certified by an officer of the court, or by an examined copy sworn to by a person who has made it or compared it with the original.

Exemplified copies are copies under the great seal attached in chancery to which the record was brought up by a writ of *certiorari* or under the seal of the court to which the record belonged.⁴ In America a copy exemplified under the seal of the court in which the record belongs has been from an early date admissible as evidence both at common law and by statute. Such a copy is conclusive as proof even on the issue of *nul tiel record*.⁵

An office copy of a record is a copy authenticated by a certificate of an officer authorized to furnish copies,⁶ and at common law it will be received upon his credit in the court where the record belongs as of equal value to the original. If, as is usually the rule throughout the United States, the court officer is authorized or directed by statute to furnish copies to all applicants, and if his certified copy has been made primary evidence of the original, then the certified or office copy will be received in any court under the same supreme jurisdiction.⁷

An examined copy is one which the witness has compared

¹ Davidson v. Murphy, 13 Conn. 317.

² Coke Lit. 260a.

³ Co. Lit. 260a; 3 Bl. Com. 24, 331.

⁴ Bull. N. P. 226, 227; 3 Inst. 173.

⁵ Boyce v. Auditor, 51 N. W. Rep. 457; 90 Mich. 314; Gunn v. Howell, 35 Ala. 144; Ladd v. Blunt, 4 Mass. 402; Vance v. Reardon, 2 Nott & McC. 299; Com. v. Phillips, 11 Pick. 28; Watrous v. Cunningham, 71 Cal. 30; Mackey v. B. & P. Co., 19 D. C. 282; Hallum v. Dickison, 47 Ark. 126; Vail v. Smith, 4 Cow. 71. It

seems that if the court has no seal none need be affixed. Com. v. Phillips, 11 Pick. 30; Com. v. Downing, 4 Gray, 29. The records of the Confederate courts are not provable by copies. Schaben's Estate, 6 Ct. of Cl. 230.

⁶ Bull. N. P. 229.

⁷ See § 243; Flack v. Andrews, 86 Ala. 395. In the absence of statute it may be presumed that the clerk has authority to furnish exemplified copies. Gunn v. Peakes, 36 Minn. 177.

with the contents of the original record or with what the officer or other person has read as such and which he is ready to swear is a true copy. It is necessary, however, in proving a record by an examined copy to show that the original record was complete¹ and was found in the proper custody and place,² though it is not absolutely essential for the persons comparing the copies with the record to read them alternately.³

The record itself is always admissible where a copy of it would be received.⁴ If the record would be inadmissible, of course the copy is also inadmissible.⁵ As a matter of practice, however, at least in modern times, the production of the records is usually dispensed with, the court being satisfied with a literally exact copy of the record certified by the clerk or exemplified by the court seal.⁶

Where the court has power to set aside a verdict it is necessary, in proving the verdict by a copy of the record, to show what judgment was docketed by the clerk, for it may be that the verdict was set aside.⁷ This is not required where the court has no power to set the verdict aside,⁸ or in the trial of

¹ *Heath v. Page*, 60 Pa. St. 108.

² *Woods v. Banks*, 14 N. H. 101;
Goodrich v. Weston, 102 Mass. 363.

³ *Rolfe v. Dart*, 2 Taunt. 52; *Lynde v. Judd*, 3 Day (Conn.), 499; *Hill v. Packard*, 5 Wend. 387; *Reed v. Lamb*, 6 Jur. 828. Cf. 1 Whart. Evid., § 94; *Dodge v. Gallatin*, 130 N. Y. 117. A judgment of a court of record cannot be proven by the judge's minutes. *Moore v. Bruner*, 31 Ill. App. 400.

⁴ See § 142c; *State v. Bartlett*, 47 Ind. 396; *Folsom v. Cressy*, 73 Me. 270; *Gray v. Davis*, 27 Conn. 447; *Johnson v. Wakulla*, 9 S. Rep. 690; 28 Fla. 720.

⁵ *Meegan v. Boyle*, 19 How. (U. S.) 130; *Lamberton v. Windom*, 18 Minn. 506; *State v. Wells*, 11 Ohio, 261.

⁶ *Davenport v. Mahon* (Pa., 1892), 6 Kulp, 350; *State v. Orrick*, 106 Mo. 111; *Cofer v. Schening* (Ala., 1893), 13 S. Rep. 123; *Mackey v. B. & P. Co.*, 19

D. C. 282. Where an issue is raised upon the existence of a domestic judicial record, the question, though one of fact, is for the court alone, on the theory that the judge can examine the very record itself. *Currier v. Richardson*, 63 Vt. 617; *Hall v. Williams*, 6 Pick. 237; *Carter v. Wilson*, 1 Dev. & Bat. 362. As respects foreign records provable only by copy, the question, turning on the authenticity of a paper, is for the jury. *Kentzer v. Kentzer*, 3 Wash. St. 166; *Adams v. Betz*, 1 Watts (Pa.), 425; *State v. Isham*, 3 Hawks (S. C.), 185; *Baldwin v. Hale*, 17 Johns. (N. Y.) 272; *Trotter v. Mills*, 6 Wend. (N. Y.) 512; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191.

⁷ *Ayrey v. Davenport*, 2 N. R. 474; *Donaldson v. Jude*, 2 Bibb, 60. Cf. *Baldrige v. Foust* (Neb.), 44 N. W. Rep. 110.

⁸ *Felter v. Mulliner*, 2 Johns. 181.

an issue of fact out of a court of equity,¹ or where the only fact to be shown is that a verdict was rendered.²

§ 147. Proof of records of court of equity and of courts of inferior jurisdiction.—The rules applicable to the proof of records of a court of common law are generally recognized in proving the decrees and orders of courts of equity.³ If it is only sought to prove the fact that a decree was rendered, copies of the pleadings upon which it was based need not be furnished, though, if the decree is pleaded in bar, it will be necessary to show the whole record as respects the matter in question.⁴

An answer in equity may, in the absence of statute, be proved in civil cases by an examined copy,⁵ though in a prosecution for perjury committed in an answer it is required to produce the original with proof that the party was sworn.⁶ In either case the identity of the party must be shown, and this may be done by proof of his handwriting or otherwise.⁷

In consequence of the looseness and lack of system with which the records of inferior courts are so often kept, the rigid requirements of the common law respecting the proof of judicial records are relaxed as concerns them.⁸ If the inferior court is of record (and that it is will be presumed), the record may be proved at common law by an exemplified or certified copy.⁹

¹ *Pitton v. Walter*, 1 Stra. 162.

² *Barlow v. Dupuy*, 1 Mart. 442.

³ See *ante*, § 146; *Blower v. Hollis*, 1 Crompt. & Mees. 396; 4 Com. Dig. 97, tit. "Evidence," c. 1; *Cofer v. Schening* (Ala., 1893), 13 S. Rep. 123.

⁴ *Winans v. Dunham*, 5 Wend. 47; *Wilson v. Conine*, 2 Johns. 280. Cf. *Thomas v. Stewart*, 92 Ind. 246.

⁵ 1 Story's Eq. Pl., §§ 870-876.

⁶ *Rex v. Morris*, 2 Burr. 1189; *Rex v. Rensen*, 2 Campb. 508.

⁷ *Rex v. Morris*, 5 Burr. 1189; *Hennell v. Lyon*, 1 B. & Ald. 182. See § 129, "Identity."

⁸ *Miller v. Knapp*, 26 W. N. C. 29.

⁹ "The courts are to take notice how the records of their own and of other courts are in fact made and kept.

The clerk must of necessity take down the doings of the court in brief notes. This he usually does in a minute-book called the 'docket,' from which a full, extended and intelligible record is afterwards to be made up. Until they can be so made, these short notes must stand as the record." *Pruden v. Alden*, 23 Pick. 187; 1 Greenl. on Evid., § 513; *Holt v. Maverick* (Tex., 1894), 24 S. W. Rep. 532; *Holcomb v. Cornish*, 8 Conn. 375; *Todd v. Johnson* (Minn., 1892), 52 N. W. Rep. 864; *Baldwin v. Prouty*, 13 Johns. 430; *Com. v. Balkom*, 3 Pick. 281; *State v. Bartlett*, 47 Me. 396; *Goldstone v. Davidson*, 19 Cal. 41; *Lancaster v. Lane*, 19 Ill. 242. See cases in note 3, *infra*, p. 227.

Where the court has no seal, an exemplification may be dispensed with,¹ and if there is no clerk the judge may act as such.² Unless a strict compliance with a statutory form of certification is required, any authentication affixed to a transcript of the record substantially identifying and authenticating it will suffice.³ But where no record is kept, or where it is incomplete or fragmentary, the proceeding in inferior courts may be proven by the production of the justice's docket,⁴ of the original writ and pleadings, supplemented by the oath of the justice or clerk or of some other competent witness.⁵

The certification of the records of courts of justices of the peace is now largely regulated by statute, which should invariably be consulted. As respects the authentication of foreign judgments of justices' courts, the prevalent requirement is that the transcript of the record or the certificate of the judgment or other judicial act shall be signed by the justice and his clerk, if there be any, and that to this authentication shall be attached a certificate of a clerk of some superior court of record certifying to the capacity of the justice himself.⁶

§ 148. Proof of records of the courts of other states.—By the federal constitution it is enacted that "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which

¹ *Com. v. Downing*, 4 Gray, 29, 30.

² *Statement v. Hinchman*, 27 Pa. St. 479; *Case v. Huey*, 26 Kan. 353.

³ *Shea v. Man. R. Co.*, 8 N. Y. S. 332; *Am. Emi. Co. v. Fuller* (Iowa, 1892), 50 N. W. Rep. 48; *Mackey v. B. & P. R. Co.*, 19 D. C. 282; *Swope v. Paul* (Ind., 1892), 31 N. E. Rep. 42; *English v. Sprague*, 33 Me. 440; *Com. v. Ford*, 14 Gray, 399; *McGrath v. Seagrave*, 4 Allen, 443; *Baur v. Beal* (Colo., 1890), 23 Pac. Rep. 345; *Stamper v. Gay* (Wyo., 1890), 23 Pac. Rep. 69; *Webster v. Daniel*, 47 Ark. 131; *McDermott v. Barnum*, 19 Mo. 204.

⁴ *Beardsley v. Brame*, 85 Cal. 134.

⁵ *Holt v. Maverick* (Tex., 1894), 24 S.

W. Rep. 532; *Dyson v. Wood*, 3 B. & C. 449, 451; *Strong v. Bradley*, 13 Vt. 9; *Carpenter v. Willett*, 18 How. Pr. 400; *Shea v. Man. Ry. Co.*, 8 N. Y. S. 332. A recital in a transcript of a record of a justice's court that a party was duly served is conclusive of that fact (*Payne v. Taylor*, 34 Ill. App. 491), and service may be shown by parol. *Wilkerson v. Schoonmaker*, 77 Tex. 615.

⁶ *Trader v. McKee*, 2 Ill. 558; *Dragoo v. Graham*, 9 Ind. 212; *Bank v. Evans*, 32 Iowa, 202; *Gay v. Lloyd*, 1 Greene (Iowa), 78; *Bank v. Hardin*, 1 Wright (Ohio), 430; *Belton v. Fisher*, 44 Ill. 32; N. Y. Code C. P. 939; *Beirn v. Borst*, 5 Wend. 292.

such acts, records and proceedings shall be proved, and the effect thereof."¹

In carrying out this provision congress has prescribed that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence such records are or shall be taken."²

In construing this statute, the attestation by the clerk must be in the form regularly employed in the state in which the record belongs. If, as is essential, it is so certified by the judge of the court,³ the judge's certificate, which is the only admissible evidence of that fact,⁴ is conclusive.⁵ If the court has a seal it must be affixed to the clerk's attestation,⁶ while if it has none, this fact should appear in the attestation or certificate.⁷

In conformity with the requirement that the copy shall be attested by the clerk, an attestation by an under or deputy clerk will cause the transcript to be rejected,⁸ though certified

¹ Const. U. S., art. IV, § 1.

² Statute U. S., May 26, 1790 (U. S. Stats. at Large, L. & B. Ed., 122); Hall v. McKay, 78 Tex. 248; Rand v. Hanson (Mass., 1891), 28 N. E. Rep. 6; Susenbach v. Wagner, 41 Minn. 108; Rea v. Scully, 76 Iowa, 348. The proceedings of the courts of the Cherokee nation and of the territories are under the operation of this provision. Mehlin v. Ice, 56 Fed. Rep. 12.

³ Van Storch v. Griffin, 71 Pa. St. 240; Craig v. Brown, 1 Pet. C. C. 352; Burnell v. Weld, 76 N. Y. 103; Drummond v. Magruder, 9 Cranch, 122; Shown v. Barr, 29 Iowa, 296.

⁴ Smith v. Blagge, 1 Johns. Cas. 238; Holdridge v. Marsh, 30 Mo. App. 352.

⁵ Ferguson v. Harwood, 7 Cranch, 408; Bean v. Loryea, 81 Cal. 151; Andrews v. Flack, 88 Ala. 294.

⁶ Turner v. Waddington, 3 Wash. 126; Allen v. Thaxter, 1 Blackf. 399; Dunlap v. Waldo, 6 N. H. 450.

⁷ Kirkland v. Smith, 2 Mart. (N. S.) 497; Craig v. Brown, 1 Pet. 352, 353; Simons v. Cooks, 29 Iowa, 324; Strode v. Churchill, 2 Litt. (Ky.) 75.

⁸ 1 Greenl. on Evid., § 506; Donohoe v. Brannon, 1 Overt. 328; Samson v. Overton, 4 Bibb, 409; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 152;

by the judge to be in due form,¹ unless the court has no clerk, the judge discharging his duties, and these facts are stated in the certificate.² The certificate of the judge must show that he is the chief or presiding judge of the court,³ and that he was such at the time of certifying the copy of the records,⁴ though if the court has no chief judge, a certification by all the judges will not be rejected.⁵ If the certificate is by the "first judge" or senior judge it will be necessary to show *aliunde* that he was the presiding or chief judge.⁶ A certificate signed by a chief circuit judge of a certain district must show on its face that the court from which the record purports to issue is in his circuit and that he is the presiding judge of that court.⁷ The presiding judge must state that attestation is in due form,⁸ and that the clerk certifying was at the date thereof the clerk of the court.⁹ Where the court no longer exists, the clerk and presiding judge of a court with which its records and powers have been consolidated may furnish the requisite attestation.¹⁰

This statutory mode of authenticating records is not exclusive of any other mode which a court may deem proper.¹¹ In-

Schnertzell v. Young, 3 H. & McHen. (Md.) 502.

¹ Morris v. Patchin, 24 N. Y. 394. *Contra*, Young v. Glinzer, 1 Greene (Iowa), 196.

² Cox v. Jones, 52 Ga. 438; Low v. Burrows, 12 Cal. 181; Spencer v. Langdon, 21 Ill. 192; Stewart v. Swazey, 23 Miss. 502. The official occupying the dual capacity must attest as clerk and certify as judge. Melius v. Houston, 41 Miss. 59, cases *supra*.

³ Moyer v. Lyons, 38 Mo. App. 635; Von Storch v. Griffin, 71 Pa. St. 240.

⁴ Settle v. Allison, 8 Ga. 201; Stephenson v. Bannister, 3 Bibb, 369; Morris v. Patchin, 24 N. Y. 394; Pratt v. King, 1 Oreg. 49; Central Bank v. Veasey, 14 Ark. 671.

⁵ Arnold v. Frazier, 5 Strobb. (S. C.) 3.

⁶ Hudson v. Daily, 13 Ala. 722. *Cf.* Taylor v. Kilgore, 33 id. 214.

⁷ Elliott v. McClelland, 17 Ala. 206; Randall v. Burtis, 57 Tex. 362; Geron v. Felder, 15 Ala. 304.

⁸ Ordway v. Conroy, 4 Wis. 45.

⁹ Johnson v. Howe's Adm'r, 2 Stew. (Ala.) 27.

¹⁰ Darrah v. Watson, 36 Iowa, 116; Scott v. Blanchard, 8 Mart. 303; Craig v. Brown, 1 Pet. C. C. 352; Hunt v. Lyle, 8 Yerg. 142; Barbour v. Watts, 2 A. K. Marsh. 290, 293; Balfour v. Chew, 5 Mart. 517; Clarke v. Rice, 15 R. I. 132; Steere v. Tenney, 50 N. H. 461 (Confederate court).

¹¹ Thrasher v. Ballard, 33 W. Va. 285; Kingman v. Cowles, 103 Mass. 283; Ex parte Povall, 3 Leigh, 816; Kean v. Rice, 12 S. & R. 203, 208; Pepoon v. Jenkins, 2 Johns. Cas. 119; Davis v. Furman, 21 Kan. 131; State v. Hunter, 94 N. C. 829; Louisville, etc. Co. v. Parish (Ind., 1893), 33 N. E. Rep. 122.

asmuch as the statute by its terms refers only to courts having seals, clerks and a presiding judge, it is inferred that courts of limited powers and jurisdiction, as courts of justices of the peace and municipal courts, whose procedure is usually regulated by statute or local usage, and varies greatly in different states, are not included in it. The copies of proceedings of such courts are therefore to be authenticated in the manner prescribed by the laws of the state into whose courts they are introduced.¹

The statute does not apply to the authentication of copies of the record of a state court for use in a federal court or *vice versa*,² or of copies of the record of one federal court to be used in another,³ or of copies or exemplifications of the record of a private writing, as a deed or will recorded under a state statute.⁴ In such case a common-law exemplification under the seal of the court will suffice.⁵

If the requirements of the statute are substantially complied with, a properly certified copy will not be rendered inadmissible because of mere formal and verbal irregularities,⁶ or because it does not show the identity of the party,⁷ or the grounds on which the judgment was based.⁸

§ 149. Proof of foreign judgments.—At common law the records of foreign courts could be proved by exemplified copies under seal of the foreign state, by sworn and examined

¹Howard v. Coon, 93 Mich. 442; v. Hamilton, 90 Ala. 354; Hallum v. Blackwell v. Glass, 43 Ark. 209; Dickinson, 54 Ariz. 311; 15 S. W. Rep. Bryan v. Farnsworth, 19 Minn. 239; 775.

Mahurin v. Bickford, 6 N. H. 567; ⁷Missouri Glass Co. v. Gregg (Tex., Silver Lake v. Harding, 5 Ohio, 545; 1890), 16 S. W. Rep. 174. A certified copy of an assignment of a foreign judgment constituting a part of the record is admissible as evidence of the assignment. Coughran v. Gilman (Iowa, 1891), 46 N. W. Rep. 1005. So a properly authenticated certificate by a clerk of a court of probate that a person is an administrator is sufficient. Abercrombie v. Stillman, 77 Tex. 589.

Blodgett v. Jordan, 6 Vt. 580; Brown v. Edison, 23 Vt. 435. ⁸Railroad Co. v. Thornton, 12 La. Ann. 736.

²Turnbull v. Payson, 95 U. S. 218; Adams v. Way, 33 Conn. 419. *Contra*, Grant v. Levan, 4 Pa. St. 393.

³Mason v. Lawrason, 1 Cranch, 190.

⁴Russell v. Kearney, 27 Ga. 96; Carlisle v. Tuttle, 30 Ala. 613.

⁵Meuster v. Spalding, 6 McLean, 24.

⁶Bailey v. Martin, 119 Ind. 103; Dwarak v. More, 25 Neb. 735, 741; Gunn v. Peakes, 36 Minn. 177; Bogan

copies, or by copies duly certified by an official authorized by the foreign court.¹ The handwriting of certifying officers must be proved where their certificates are not exemplified by the great seal,² but the certificate of a notary to its genuineness has been held sufficient.³ The seal of the foreign court must be proved,⁴ though judicial notice will be taken of the great seal of the foreign government and of the seals of courts of admiralty.⁵ If the court has no seal a seal will not be required,⁶ but a stricter degree of proof of the clerk's signature will perhaps be necessary.⁷

As a general rule in the proof and construction of foreign records,⁸ a court will be entitled to every aid which will place it exactly in the position of a court of similar jurisdiction in the foreign state. It has a right, therefore, to require an explanation of technical terms, to examine the certified foreign copy, and to require a translation of it if necessary, and proper information bearing upon any special law⁹ or peculiar rule of construction which obtains in the foreign state.¹⁰

§ 150. **Records of surrogates' courts.**—A will is not admissible as evidence until it has been probated in due form in the surrogates' courts,¹¹ or in some court having power and

¹Gunn v. Peakes, 36 Minn. 177; Church v. Chibbart, 2 Cranch, 228; Buttrick v. Allen, 8 Mass. 273; Pickard v. Bailey, 6 Foster (N. H.), 152. Cf. Kopperl v. Nagy, 37 Ill. App. 23. It seems doubtful whether a foreign record can be proved by an office copy or by a certified copy unless the certificate itself has been properly exemplified under the seal of the court from which it proceeds or by the great seal of the state. Griswold v. Pitcairn, 2 Conn. 85; Las Caygas v. Larienda, 4 Mart. (La.) 283; Packard v. Hill, 7 Cow. 434; Peterman v. Laws, 6 Leigh (Va.), 523; Catlett v. Insurance Co., 1 Paine (U. S. C. Ct.), 594; Stein v. Bowman, 13 Pet. 209; Cavam v. Stewart, 1 Stark. 523.

²See cases in last note.

³Yeaton v. Fry, 5 Cranch, 335.

⁴See *post*, § 244; Gardner v. Col. Ins. Co., 7 Johns. (N. Y.) 511; Cap-

ling v. Herman, 17 Mich. 524; Pickard v. Bailey, 26 N. H. 152; Thompson v. Mason, 4 Bradw. (Ill.) 452; Delafield v. Hand, 3 Johns. 310.

⁵Lincoln v. Battelle, 6 Wend. 484; Thompson v. Stewart, 3 Conn. 171; Yeaton v. Fry, 5 Cranch, 335; *post*, §§ 243, 244.

⁶Packard v. Hill, 7 Cow. 434.

⁷Black v. Lord Braybrook, 2 Stark. 7; Thompson v. Stewart, 3 Conn. 171.

⁸United States v. McRae, L. R. 3 Ch. 86; Dore v. Thornburgh (Cal., 1891), 27 Pac. Rep. 30.

⁹Arkansas v. Bowen, 20 D. C. 291.

¹⁰Di Sora v. Phillips, 33 Law J. Ch. (H. L. Cas.) 129; In re Cliffs Trusts (1892), 2 Ch. 229. See article in 35 Cent. L. J. 341.

¹¹Kittredge v. Folsom, 8 N. H. 111; Ochoa v. Miller, 59 Tex. 461; Mour-sund v. Priess (Tex., 1892), 19 S. W. Rep. 775.

jurisdiction over the administration of the estates of decedents; and in nearly all the states probate is conclusive of the validity and testamentary character of the writing in regard to both real and personal property.¹

After probate the will itself,² or a properly authenticated copy, may be read in proof of any matter of fact therein to which it is relevant.³ Where the fact of probate is in issue the decree of the probate court, exemplified in the form which is observed by courts of record in certifying to transcripts from their records, is admissible as conclusive of the fact.⁴

§ 150a. **Proof of returns on writs.**—A return is a written statement or certificate of a sheriff or other officer serving a writ showing what he did, with particulars of time and place, and it may be employed as primary evidence of his acts and their result in executing the writ. The return should show affirmatively that all the requirements of the law have been strictly pursued,⁵ and should state briefly the course pursued by the officer in order that the court may be placed in a position to decide upon its admissibility as evidence of service.⁶

¹Dublin v. Chadbourne, 16 Mass. 433; Patten v. Tallman, 27 Me. 17; Brown v. Wood, 17 Mass. 68, 72; Judson v. Lake, 3 Day, 318; Lewis v. Lewis, 5 La. 388; Bogardus v. Clark, 4 Paige, 623; Peeble's Appeals, 15 S. & R. 42; Tompkins v. Tompkins, 1 Story, 547; Harrison v. Rowan, 3 Wash. C. C. 580; Darby v. Mayer, 10 Wheat. 465. See *post*, § 143. See *contra*, as to devises of real property, Barker v. McFerran, 26 Pa. St. 211; Harven v. Spring, 10 Ired. 80; Randall v. Hodges, 3 Bland, 47; Darbey v. Mayer, 10 Wheat. 470; Robertson v. Barbour, 6 B. Mon. 527.

²Manning v. Purcell, 24 L. J. Ch. 523; Compton v. Bloxham, 2 Coll. 201; Child v. Ellsworth, 2 D. M. & G. 683; Oppenheim v. Henry, 9 Hare, 802; Gauntlett v. Carter, 17 Beav. 590; Turner v. Hellard, 30 Ch. D. 390.

³Hurst v. Mellinger, 73 Tex. 189; Dupeyster v. Gagoni, 84 Ky. 403; Lockwood v. Lockwood, 57 Hun, 337; Nelson v. Potter, 50 N. J. L. 636; 15

Atl. Rep. 375. See § 1416. In the case of a foreign will it has been held that it should be accompanied by a copy of the order of probate. Green v. Blair, 22 S. W. Rep. 256.

⁴See §§ 146, 148, 149; Chase v. Hathaway, 14 Mass. 222, 227; Judge v. Briggs, 3 N. H. 309; Farnsworth v. Briggs, 6 N. H. 561; Lindsley v. O'Reilly, 50 N. J. L. 636; 15 Atl. Rep. 879. As to other facts in probate courts, see Roberts v. Connell, 8 S. W. Rep. 626; Williams v. Mitchell, 112 Mo. 300 (proof of order of a probate court); Sherwood v. Baker (Mo., 1891), 16 S. W. Rep. 938; Simmons v. Saul, 138 U. S. 439.

⁵Walsh v. Anderson, 135 Mass. 65; Sweeney v. Girolo, 154 Pa. St. 609; Glines v. Iron Hall, 22 Civ. Pro. R. 437.

⁶O'Leary v. Durant, 70 Tex. 409; Henry v. Tilton, 19 Vt. 447; Merritt v. White, 31 Mass. 438; Philadelphia v. Newkumet, 11 Pa. Co. Ct. R. 504; Tallman v. B. & O. R. Co., 45 Fed. Rep. 156; Boyle v. Whitney, 8 Pa.

In accordance with the presumption that an official has properly performed his duty,¹ the courts are inclined to favor the sufficiency of returns and to admit them whenever it is possible to do so.²

The signature to the return should be by the officer or in his name and not by deputy.³ The return should be indorsed upon the writ,⁴ in language sufficiently certain and definite to enable the court to comprehend the subject-matter described and the action of the officer in regard to it. Parol evidence is always admissible to explain the language of the return or to identify the subject-matter, though not always to vary or contradict it,⁵ unless fraud is alleged.⁶ A return which is not properly filed is invalid⁷ and inadmissible because it is incomplete. Until filing, however, the power of the officer over the return is absolute and he may amend it without leave of court.⁸ After filing, the power to permit an amendment is discretionary with the court,⁹ but permission to amend will usually be granted where the actual facts in the case require it on application by the officer before,¹⁰ or even after,¹¹ his official term has expired.

Co. Ct. R. 501; *People v. Kent* Circ. Judge, 41 Mich. 722.

¹ See *post*, § 241.

² Verbal irregularities will thus be disregarded. *Galliano v. Kilfoy*, 94 Cal. 86; *Veazey v. Brigman*, 93 Ala. 548; *Forbes v. McHaffie*, 32 Neb. 742; *Cheshire v. Wagon Co.*, 89 Ga. 249; *Livar v. Livar*, 26 Tex. App. 115.

³ *Rowley v. Howard*, 23 Cal. 401; *Cox v. Montford*, 66 Ga. 62 (signature by mark); *Mitchell v. Com.* (Va., 1893), 17 S. E. Rep. 480; *Simmes v. Simmes*, 88 Ky. 642; *Emley v. Drum*, 36 Pa. St. 123; *Callender v. Olcott*, 1 Mich. 344; *Gibbons v. Pickett* (Fla., 1893), 12 S. Rep. 17; *Reinhart v. Lugo*, 86 Cal. 395. *Contra*, *Kelly v. Harrison*, 69 Miss. 456.

⁴ *Dickson v. Peppers*, 7 Ired. (N. C.) 429.

⁵ *Payne v. Billingham*, 10 Iowa, 360.

⁶ *McComb v. Council Bluffs*, *infra*; *Cully v. Shirk*, *infra*.

⁷ *State v. Melton*, 8 Mo. 417; *Beall v. Shattuck*, 53 Miss. 358; *Nelson v. Cook*, 19 Ill. 440.

⁸ *Spencer v. Fuller*, 68 Ga. 73; *Wilcox v. Monday*, 89 Ind. 232; *Nelson v. Cook*, 19 Ill. 440; *Welch v. Joy*, 13 Pick. 477.

⁹ *Austin v. Day*, 17 Pick. (Mass.) 208; *Miller v. Shackelford*, 4 Dana (Ky.), 264; *Johnson v. Day*, 17 Pick. (Mass.) 108; *Baker v. Davis*, 22 N. H. 27; *Com. Union Ins. Co. v. Everhart*, 88 Va. 952; *Mills v. Howland*, 2 N. D. 30; *Turner v. Holden*, 109 N. C. 182; *Shufeldt v. Barlass*, 33 Neb. 785.

¹⁰ *Williams v. Moore*, 68 Ga. 585; *Hutchins v. Com'rs*, 16 Minn. 13;

¹¹ *Bentell v. Oliver*, 89 Ga. 246; *Avery v. Bowman*, 39 N. H. 595; *Keen v. Briggs*, 46 Me. 467; *Dwiggins v. Cook*, 71 Ind. 579; *Scrugs v.*

Scrugs, 46 Mo. 271. *Cf.* *Williamson v. Wright*, 75 Me. 35; *Foreman v. Carter*, 9 Kan. 674.

The conclusiveness of the return as to all facts stated therein, both as between the parties to the writ and their privies,¹ and against the officer himself,² is supported by a majority of the decisions. When, however, the return is sought to be used as evidence by the officer in his own behalf, the principle of estoppel does not apply, and its invalidity may be shown or the facts stated therein may be contradicted by any proper and competent evidence.³ The same rule is applicable where the return is introduced as evidence in an action between third persons, neither parties nor privies to the writ, and where the facts in the return are only collateral to the main issue.⁴

Service of a writ by publication may be shown by the production of the writ as published in the newspaper, together with the affidavit of the publisher setting forth that the same was properly published, with the facts of the times and places of publication as the same may be required under the statutes regulating this matter.⁵

Dunn v. Rogers, 43 Ill. 260; *Sawyer v. Harmon*, 136 Mass. 414; *McArthur v. Currie*, 32 Ala. 75; *Clayton v. State*, 24 Ark. 16; *Mahurin v. Brackett*, 5 N. H. 9.

¹ *Cully v. Shirk*, 131 Ind. 76; *Philips v. Elwell*, 14 Ohio St. 240; *Flanniken v. Neal*, 67 Tex. 629; *Ex parte Durbin*, 102 Mo. 100; *Lowery v. Caldwell*, 139 Mass. 88; *Barrett v. Copeland*, 18 Vt. 67; *Hotchkiss v. Hunt*, 56 Me. 252; *In re Ah Foy*, 45 Fed. Rep. 795; *Cozine v. Walter*, 55 N. Y. 304; *United States v. Gayle*, 45 Fed. Rep. 107; *Higley v. Pollock* (Nev., 1892), 27 Pac. Rep. 895; *Ringold v. Edwards*, 7 Ark. 86; *Egery v. Buchanan*, 5 Cal. 56; *Heath v. Missouri R. Co.*, 83 Mo. 624. *Contra*, *Johnson v. Gregory*, 4 Wash. St. 109; *Grady v. Gosline*, 48 Ohio St. 665; *Wilson v. Shipman*, 31 Neb. 573; *McComb v. Insurance Co.*, 83 Iowa, 247; *Wheeler v. McLaughlin*, 8 N. Y. S. 95; *Godwin v. Monds*, 106 N. C. 448; *Burton v. Schenck*, 40 Minn. 52.

² *State v. Ruff* (Ind., 1893), 33 N. E. Rep. 124; *Hawey v. Foster*, 64 Cal. 296; *Walter v. Moore*, 90 N. C. 41; *Shotwell v. Hamblen*, 23 Miss. 156.

³ *Stanton v. Hodges*, 6 Vt. 64; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Carnell v. Cook*, 7 Cow. (N. Y.) 310; *Halcomb v. Stubblefield*, 76 Tex. 310.

⁴ *Knutsen v. Davis* (Minn., 1893), 53 N. W. Rep. 646; *Allen v. Gray*, 11 Conn. 95; *Kendall v. White*, 3 Me. 245; *Field v. United States*, 9 Pet. (U. S.) 183; *Henderson v. Evans*, 14 Barb. (N. Y.) 15; *Bolt v. Burnell*, 9 Mass. 96.

⁵ See *ante*, § 145; *State v. Georgia Co.*, 109 N. C. 310; *Roberts v. Roberts* (Colo., 1893), 31 Pac. Rep. 941; *Lane v. Innes*, 43 Minn. 137; *Frisk v. Reigelman*, 43 id. 137; *Wilkinson v. Conaty*, 65 Mich. 614; *White v. Hinton*, 3 Wyo. 753; *Taylor v. Coots*, 32 Neb. 30; *Michael v. Michael*, 137 Ill. 485.

§ 150b. **The effect of judicial records as evidence.**—The conclusiveness of a judgment in a prior suit as evidence in a suit between the same parties for the same cause of action is based upon the legal principle that public policy demands that unnecessary and perhaps endless litigation should be avoided, and that a cause once fairly tried and determined by a court of competent jurisdiction should be considered forever closed and settled. The judgment of a court having jurisdiction is binding upon all the parties and upon all those in privity with them, whether in estate, in law or in blood, and whether this identity of interest is successive or mutual and concurrent.¹ But a stranger to the record, *i. e.*, a person who is not interested in the original litigation directly or indirectly, and who could neither prosecute nor defend, offer evidence, cross-examine the witnesses, or appeal from the result, and who does not occupy the position of a privy, is not estopped. He may therefore, when in a subsequent suit his rights or title is collaterally affected by the judgment, show that it is invalid and void as to him.² The party in whose favor the judgment has been rendered and his privies are bound by it to the same extent as the party against whom it was ren-

¹ *Michaels v. Post*, 21 Wall. 426; *Carter v. Bennett*, 4 Fla. 352; *Chapin v. Curtis*, 23 Conn. 388; *Key v. Dent*, 14 Md. 86; *Emery v. Fowler*, 39 Me. 326; *Daily v. Sharkey*, 29 Mo. App. 518; *Hancock v. Flynn*, 8 N. Y. S. 133; *State v. Brook*, 29 Mo. App. 286; *Averell v. Sec. Nat. Bank*, 19 D. C. 246; *Cook v. Rice*, 91 Cal. 664; *Norton v. Doherty*, 3 Gray (Mass.), 372; *Bigelow v. Winsor*, 1 Gray (Mass.), 299, 303; *Webber v. Mackey*, 31 Ill. App. 369; *Glass v. Blackwell*, 48 Ark. 55.

² *Vose v. Morton*, 4 Cush. (Mass.) 27, 31; *Roman Cath. Archbishop v. Shipman*, 11 Pac. Rep. 343; 69 Cal. 586; *Fidelity I. T. & S. D. Co.*, 33 W. Va. 761; *Franklin Sav. Bank v. Taylor*, 13 Ill. 376; 23 N. E. Rep. 397; *Masterson v. Little*, 75 Tex. 682; *Jones v. Ludlow*, 6 Ohio Cir. Ct. Rep. 57; *Guaranty T. & Safe Dep. Co. v. Green Cove Spring & M. R. Co.*, 11 S. Ct. 512; 139 U. S. 137; *Franz Falk Brew. Co. v. Hirsch*, 78 Tex. 193; *Griffith v. Happersberger*, 86 Cal. 605; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Haywood v. Thacher*, 19 N. Y. S. 882; *Missouri R. R. Co. v. Heidenheimer*, 82 Tex. 195. "Whenever any judgment is offered as evidence, the party against whom it is so offered may prove that the court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion to which neither he nor any person to whom he is privy was a party." *Stephen's Digest*, art. 46.

dered. The judgment is equally conclusive as an estoppel upon both.¹

§ 151. The effects of judgments on those in privity with the parties.—The doctrine by which a judgment is deemed to be conclusive upon the parties and those who are in privity with them is based on the principles that are applicable to the admissions of parties in privity.² Thus, an heir³ is estopped by a judgment against the ancestor, and generally the same rule is applicable to those who take an estate in dower,⁴ by the curtesy, or as a legatee, devisee,⁵ grantee or mortgagee.⁶ A judgment of ouster on a writ of *quo warranto* is conclusive evidence against subordinate officials whose title is derived from the official ousted.⁷ A judgment against the assignor, rendered while the property assigned was in his possession and relating to it, is evidence against the assignee,⁸ and the same principle is recognized as regards an executor or administrator in the case of a judgment against or in favor of the deceased person whom he represents.⁹

Though a reversioner is not bound by a judgment against his tenant unless he intervene and become an actual party to the suit,¹⁰ yet, as remainder-men derive their successive estates from a common source of title, it is clear that a judgment which was rendered against any one of them which overthrew that title would be binding on all.¹¹ So a judgment rendered

¹ Wood v. Davis, 7 Cranch, 271; Strayer v. Johnson, 1 Atl. Rep. 222; 110 Pa. St. 21.

² Kirk v. Kirk, 33 N. E. Rep. 552; 137 N. Y. 510; Kent v. Church, 136 N. Y. 10; 32 N. E. Rep. 704; Howes v. Rucker, 94 Ala. 166; Lawson v. Kelly, 82 Tex. 497.

³ See cases in preceding note.

⁴ Tanquey v. O'Tonnel, 132 Ind. 62.

⁵ Outram v. Sherwood, 3 East, 353; Turner v. Cate (Ga., 1893), 16 S. E. Rep. 971.

⁶ Satterwhite v. Shirley, 25 N. E. Rep. 1100; Amer. Mortg. Co. v. Boyd, 92 Ala. 139; Brown v. Bocquin (Ark., 1893), 20 N. W. Rep. 813.

⁷ Rex v. Mayor, 5 T. R. 66, 72, 76; Rex v. Hebron, 2 Stra. 1109.

⁸ Adams v. Barnes, 17 Mass. 365; Chapin v. Curtis, 23 Conn. 388; Hartje v. Vulcanized Fiber Co., 44 Fed. Rep. 648; Huntley v. Holt, 22 Atl. Rep. 34; 59 Conn. 102; Carlyle v. Carlyle W. L. & Power Co., 36 Ill. App. 28.

⁹ Clapp v. Herrick, 129 Mass. 292; Emery v. Fowler, 39 Me. 326; Parkhurst v. Berdell, 110 N. Y. 392; Key v. Dent, 14 Md. 86; Ballou v. Ballou, 110 N. Y. 402; Carver v. Jackson, 4 Peters, 85, 86; Case v. Reeve, 14 Johns. 81.

¹⁰ Thompson v. McCormick (Ill., 1891), 26 N. E. Rep. 373.

¹¹ Pyke v. Crouch, 1 Ld. Raym. 730.

against a trustee during the existence of the trust binds the beneficiaries¹ and their next of kin² or personal representatives.

§ 152. **Must be final and on the merits.**—A judgment is conclusive on the parties only in case it is final; that is, “where it puts an end to the action by declaring that the plaintiff has or has not entitled himself to the remedy for which he sues.”³ Where the plaintiff is nonsuited or the suit is remanded or discontinued by plaintiff, or where the suit has not been prosecuted to a determination, the judgment is not conclusive.⁴ So also the judgment must have been rendered on the merits; for if it be based on a mere technical defect,⁵ or lack of legal capacity of either party to sue,⁶ or of jurisdiction by the court, it will not be a bar.⁷ Thus, where the defendant interposes an equitable defense which he subsequently withdraws, he is not precluded from employing that defense in another suit.⁸ But the filing of an appeal or the giving of a stay bond pending an appeal from the judgment does not, so long as the judgment is final and upon the merits, operate to render the judgment inadmissible as evidence in a subsequent action at any time during the pendency of the appeal.⁹

¹ Pollitz v. Frust Co. 53 Fed. Rep. 210; Robertson v. Van Cleave (Ind. 1891), 26 N. E. Rep. 899.

² *In re Strant*, 5 N. Y. S. 127; 126 N. Y. 201; 27 N. E. Rep. 259.

³ Anderson's Law Dict.

⁴ McGourkey v. Railroad Co., 146 U. S. 536; Hull v. Blake, 13 Mass. 155; Holbert's Estate, 57 Cal. 257; Dunham v. Carson (S. C., 1893), 15 S. E. Rep. 960; Sivers v. Sivers (Cal., 1893), 32 Pac. Rep. 571; Stedman v. Potterie, 139 Pa. St. 100; Gapen v. Bretlernitz (Neb., 1890), 47 N. W. Rep. 918; Louisville, N. A. & C. Ry. Co. v. Wylie (Ind., 1890), 27 N. E. Rep. 122; Parks v. Dunlap, 86 Cal. 189; State v. Anderson (Fla., 1890), 8 S. Rep. 1; Hallum v. Dickinson, 47 Ark. 126; Kaufman v. Schneider, 35 Ill. App. 256 (ruling on appealable order); Danielson v. Northwestern Fuel Co.,

55 Fed. Rep. 49; Sanford v. Oberlin College, 31 Pac. Rep. 1088; 50 Kan. 342. *Cf.* Pilcher v. Ligon (Ky., 1890), 15 S. W. Rep. 513.

⁵ Kern v. Wilson, 48 N. W. Rep. 919; McDonald v. Rainor, 8 Johns. 442.

⁶ Jones v. Hunter, 32 Ill. App. 445; Rudolph v. Underwood, 15 S. E. Rep. 55; 88 Ga. 664; Hemminge v. Heald (N. J., 1893), 26 Atl. Rep. 449; Rodgers v. Levy (Neb., 1893), 54 N. W. Rep. 1080; Hendricks v. Clouts (Ga., 1893), 17 S. E. Rep. 119.

⁷ Gilmer v. Morris, 46 Fed. Rep. 333; Estil v. Taul, 2 Yerger, 467, 470; Bank v. Lewis, 8 Pick. 113; Dixon v. Sinclair, 4 Vt. 354; Davie v. Davis (N. C., 1890), 13 S. E. Rep. 240.

⁸ Cockerill v. Stafford, 102 Mo. 57.

⁹ Willard v. Ostrander (Kan., 1893), 32 Pac. Rep. 1092; Stevens v. Ste-

§ 153. Judgments only conclusive as to material facts in issue.—A judgment is conclusive as an estoppel in a subsequent suit only so far as it determines those particular facts which were directly in issue.¹ A party is called upon to affirm or deny facts material to the issue only, and for this reason the judgment record is not binding upon the parties in respect to those matters which are neither material nor relevant to the controversy. So the judgment is not evidence of any matter of fact which was merely collateral to the issue or remotely or incidentally involved, or which can only be inferred by argument, or the decision of which was not necessary to the issue.²

But while it is necessary that the fact which the judgment is introduced to prove should have been material in the prior cause and the issue should be substantially identical, it is not essential that the issue in the earlier case should have been joined upon the *precise point* which is in issue in the later proceedings, if the proof of the existence of the fact in issue in the latter was necessary to the rendition of the judgment.³

vans, 23 N. Y. S. 520; 69 Hun, 332; Westmoreland v. Richardson Co. (Tex., 1893), 21 S. W. Rep. 167; O'Malia v. Glynn, 42 Ill. App. 51; Harris v. Barnhart (Cal., 1893), 32 Pac. Rep. 589. *Contra*, Texas I. R. Co. v. Jackson, 22 S. W. Rep. 1030.

¹ "Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved." Stephen's Digest, art. 41.

² De Grey, J., in *Duchess of Kingston's Case*, 20 How. St. Tr. 538. The court in this case says further: "The judgment of a court of concurrent jurisdiction directly upon the point is a bar, or as evidence conclusive

upon the same parties, upon the same matter directly in question in another court; secondly, that a judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose." *Rice v. Aiken* (Tex., 1893), 22 S. W. Rep. 101; *Gillim v. Daviess Co.* (Ky., 1890), 14 S. W. Rep. 838; *Walker v. Leslie* (Ky., 1890), 14 S. W. Rep. 682; *Miller v. Union Switch Sig. Co.*, 59 Hun, 624; *In re Holmes*, 131 N. Y. 80; *Springer v. Bien*, 10 N. Y. S. 530; 27 N. E. Rep. 1076; *Dodd v. Scott*, 46 N. W. Rep. 1057; *Rhoads v. Metropolis*, 36 Ill. App. 123.

³ *Adams v. Pearson*, 7 Pick. 341; *Duden v. Maley*, 43 Fed. Rep. 407; *Hudson v. Yost*, 13 S. E. Rep. 836; *Shepherd v. Stockham*, 45 Kan. 244; *Pierson v. Conley* (Mich., 1893), 55

§ 154. Identity of cause of action required.— There must, however, be a real and substantial identity between the prior cause of action and the present. So a judgment rendered in an action, in order to be a bar in a subsequent suit between the same parties, must not only relate to the same general subject-matter but to the same cause of action.¹ In this connection it should be said that a party must present to the court all the grounds on which he expects a judgment. Otherwise there would be no end to litigation.² He will not be allowed to split up a single cause of action which in its nature is indivisible—as, for example, a right to recover for a total breach of an entire contract—and bring a number of suits thereon.³ But where one has two causes of action for which he seeks redress in a single action, a judgment rendered after

N. W. Rep. 387; *Christy v. Spring* (Cal., 1893), 31 Pac. Rep. 110; *Henry v. Samson* (Tex., 1893), 21 S. W. Rep. 69; *Fidelity Ins. F. & S. D. Co. v. Gazzam*, 2 Pa. Dist. R. 569. The rules governing the conclusiveness of judgments are thus summed up by the court in *Packet Co. v. Sickles*, 5 Wall. 592: “When the judgment rendered in the former trial is used as a technical estoppel, or is relied upon as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined. That is, if the record of the former trial shows that *the verdict could not have been rendered without deciding the particular matter*, it will be considered as having settled that matter as between the parties; and where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears extrinsically that the matter was properly within the issue in the former suit, if it be not shown that the verdict and judgment

necessarily involved its determination it will not be concluded.” See, also, *Dutton v. Woodman*, 9 Cush. 225; *Eastman v. Cooper*, 15 Pick. 276.

¹ *Lume v. Scott*, 44 Minn. 110; *Dulin v. Prince*, 29 Ill. App. 209; *McVight v. Bell*, 26 W. N. C. 281; *Cornell v. Donovan*, 14 Daly, 295; *Merscheim v. Mus. M. P. Union*, 24 Abb. N. C. 252; *Humason v. Lobe*, 76 Tex. 512; *Parks v. Richardson*, 35 Mo. App. 192; *Illinois Cent. R. R. Co. v. Slater*, 39 Ill. App. 69; *Davis v. Sexton*, 35 Ill. App. 307; *Montrose v. Wanamaker*, 57 Hun, 590.

² *Stark v. Starr*, 94 U. S. 485.

³ *Lorrillard v. Clyde*, 55 N. Y. Super. Ct. 308; 122 N. Y. 41; *Skeen v. Springfield Eng. & T. Co.*, 42 Mo. App. 158; *Beronio v. So. Pac. R. Co.*, 80 Cal. 415; *Bowe v. Minn. Milk Co.*, 44 Minn. 460; *Pilcher v. Ligon* (Ky., 1890), 15 S. W. Rep. 513; *Macdougall v. Knight*, 25 Q. B. Div. 1; *Busch v. Jones*, 94 Mich. 223; *McCain v. Louisville, etc. Co.* (Ky., 1893), 22 S. W. Rep. 325; *Parmentery v. State*, 105 N. Y. 154; *Olmstead v. Bael* (Md., 1893), 25 Atl. Rep. 343.

litigation on one cause only does not preclude a subsequent action on the other.¹

It is a general rule that where two actions are brought between the same parties for the same cause, the prior judgment is conclusive as to every point directly involved which was or might have been litigated,² though if the second suit is between the same parties for a different cause of action, the judgment is conclusive only on such questions directly involved as were actually litigated.³

In considering the identity of the questions or causes of action involved in the two suits, it is immaterial that the subject of the earlier suit was more extensive than that involved in the latter if the present cause of action which is in controversy was actually embraced in the judgment or verdict rendered. The law requires a substantial identity in the nature of the causes of action — not merely a formal, artificial and technical identity arising solely from the fact that the two transactions are co-extensive. If on an inspection of the record there is any doubt whether the precise question now at issue was involved or was decided in the prior suit, extrinsic evidence will be received to ascertain this point and effectuate the prior adjudication.⁴

¹ *Bontin v. Linsley* (Wis., 1893), 54 N. W. Rep. 1017.

² *Rareshide v. Enterprise Ginning & Mfg. Co.* (La., 1890), 9 S. Rep. 642; *Taylor v. Taylor*, 26 Abb. N. C. 360; *Nichols v. Murphy*, 36 Ill. App. 205; *Helfenstein's Estate*, 135 Pa. St. 293; *Fidelity Ins. & S. D. Co. v. Gazzam*, 2 Pa. Dist. R. 569; *Pennock v. Kennedy*, 153 Pa. St. 179; *Butler v. Suf. Glass Co.*, 126 Mass. 512.

³ *Cromwell v. Sac Co.*, 94 U. S. 351; *Nesbit v. Ind. District of Riverside*, 144 U. S. 610; 12 S. Ct. 746; *Newberry v. Sheffy* (Va., 1892), 15 S. E. Rep. 548; *Robinson v. Parks*, 76 Md. 118; 24 Atl. Rep. 417; *Smeaton v. Austin*, 82 Wis. 76; 51 N. W. Rep. 1090; *Gilbert v. Thompson*, 9 Cush. 348, 350; *Potter v. Baker*, 19 N. H. 166; *Lamprey v. Nudd*, 9 Foster (N.

H.), 299; *Wolverton v. Baker*, 86 Cal. 591; *Parker v. Straat*, 39 Mo. App. 616.

⁴ "A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But it must appear from the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty — for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which was litigated and upon which the judgment was rendered — the whole subject-matter will be at large and open to new con-

As regards the identity of the party, it may be said that, in the case of a joint and several contractual liability, a prior judgment against all the co-obligors jointly is not admissible in a subsequent action against one. On the other hand, a former several judgment cannot be pleaded in bar in an action afterwards brought against all jointly.

Any individual by entering into a joint and several contract agrees, by implication, that he will be liable in a *quasi*-double capacity. He enters into two distinct agreements, and gives his obligee two different causes of action and two different remedies at law against himself. He cannot, therefore, be heard to claim, when he is sued in one capacity or by one remedy, that the matter has been already adjudicated by or in another.¹ But where a party has only one cause of action, either joint or several, though he may have several remedies, the judgment obtained by the employment of one of them will be a bar to his employment of the others.²

§ 155. Persons affected by judgments in rem and judgments regulating personal status.—The general rule is that a judgment is not binding upon persons who are not parties to it or who are not in privity with either of those who are.³ An exception to this rule is recognized in proceedings *in rem*, including under that term all suits in admiralty for the enforcement of maritime liens and contracts, and similar suits in other courts for the violation of revenue laws. Judgments *in rem* are conclusive on all persons upon the assumption that the publicity attendant upon the seizure of the *res* and the issue of the monition is notice to all persons who have any interest in the property to appear and assert their rights.⁴ But the

tention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell v. Place*, 94 U. S. 608.

¹ *Mason v. Eldred*, 6 Wall. 235-241; *United States v. Cushman*, 2 Sumn. 426, 437-441; *Sheehy v. Mandeville*, 6 Cranch, 253, 265. *Contra*, *Mann v. Edwards*, 34 Ill. App. 473; *Wilson v. Casey* (Tex., 1893), 22 S. W. Rep. 118; *Beals v. Judge*, 91 Mich. 146.

² *Weill v. Fontanel*, 31 Ill. App. 615; *Taylor v. Taylor*, 26 Abb. N. C. 360. In an action to recover for trespass, a judgment rendered in a previous court to enjoin the trespass is competent evidence. *Beach v. Elmira*, 58 Hun, 606.

³ See *ante*, §§ 153-155.

⁴ *The Olive Mount*, 50 Fed. Rep. 563; *Oldham v. Stevens* (Kan., 1890), 25 Pac. Rep. 863; *Baily v. Sundberg*, 43 Fed. Rep. 81; 49 Fed. Rep. 583.

res must have been actually seized to confer jurisdiction,¹ though if jurisdiction has once been obtained it will continue until final judgment, even though the *res* has been removed.²

§ 156. **Criminal judgments.**—A judgment in a prosecution for crime may be shown by the record to prove the fact that it was rendered. Such a judgment is not admissible as evidence in a civil suit to prove any fact or circumstance which was found by the jury in the criminal trial.³ Aside from the rule of evidence that, in a criminal trial, the jury must be convinced of the guilt of the prisoner beyond a reasonable doubt, while in a civil action they may decide according to the weight of evidence,⁴ the absence of any identity of the parties in the two transactions precludes the employment of the criminal judgment as evidence in a subsequent civil action. On the other hand, a civil judgment is upon like principles inadmissible in a criminal trial.⁵ A judgment rendered in a criminal action is competent evidence of the facts determined in another prosecution of the same person for another or for the same crime.⁶

§ 157. **Proof of judgments as facts and their use in proving ulterior facts distinguished.**—As already explained, a judicial record is admissible to prove those matters of fact recited in it only in subsequent proceedings between the same parties or their representatives in privity. But where only the fact of the rendition of a judgment is to be proved, a different rule is recognized. The record of a judgment is the evidence of a public transaction, and it is conclusive evidence in any subsequent proceedings between any persons whatsoever where the point in issue is, was a certain judgment rendered or not.⁷ So the record of the plaintiff's acquittal or convic-

¹ Taylor v. Carryl, 20 How. (U. S.) 883.

² The Rio Grande, 23 Wall. (U. S.) 348; Cooper v. Reynolds, 10 Wall. 317.

³ Landa v. Obert, 14 S. W. Rep. 297; 78 Tex. 33; Schreiner v. Order of Foresters, 35 Ill. App. 576.

⁴ See *ante*, §§ 5, 6.

⁵ Com. v. Horton, 9 Pick. 206; Bradley v. Bradley, 2 Fairf. 367; Bradley

v. Beetle (Mass., 1890), 26 N. E. Rep. 429.

⁶ Com. v. Evans, 101 Mass. 25; Dennis' Case, 110 id. 18.

⁷ Bensimer v. Fell (W. Va., 1891), 12 S. E. Rep. 1078. A judgment may be considered in evidence, though not formally introduced and read, where counsel admit its existence and witnesses testify to the facts therein without objection by either party.

tion is admissible to show these facts in a subsequent suit brought by him to recover for false imprisonment though the parties are not identical.¹ Again, where the party against whom the judgment was rendered is suing to be exonerated,² or when the judgment, as in the case of a certain decree in chancery, partakes of the nature of a muniment of title,³ or furnishes the source of one's title acquired under a sheriff's deed,⁴ or the basis of a claim against an official for negligence in enforcing it,⁵ the existence of the judgment may be shown *res inter alios acta*, neither the parties nor the cause of action being the same.⁶

§ 158. **Validity and effect of foreign judgments.**—The judgment *in rem* of a foreign court having jurisdiction of the subject-matter is universally conclusive and binding if the land or other property, movable or immovable, is located in its jurisdiction.⁷ Its decision, whatever may be its nature, will be held binding in every country whether the same question is directly or only incidentally involved.⁸

The English rule is followed in some of the states, and the judgment is binding as to all facts whether directly or incidentally decided. In others the judgment is not conclusive except as to the property directly involved, and other facts adjudicated may be relitigated.⁹ Of course the rule as thus stated is to be taken with the limitations that the cause *in rem* has been tried and the judgment rendered *bona fide*,¹⁰ that the foreign judge was impartial,¹¹ that the decision is consist-

Zieverink v. Kempner (Ohio, 1893), 34 N. E. Rep. 250.

¹ Barhyt v. Valk, 12 Wend. (N. Y.) 145; Garvey v. Wayson, 22 Md. 178.

² Kip v. Brigham, 6 Johns. 158; Weld v. Nichols, 17 Pick. 538.

³ Barr v. Gratz, 4 Wheat. 213.

⁴ Jackson v. Wood, 3 Wend. 27, 34; Witmer v. Schlatter, 2 Rawle, 359; Fowler v. Savage, 3 Conn. 90, 96.

⁵ Adams v. Balch, 5 Greenl. 188.

⁶ Fiscus v. Guthrie, 125 Ind. 598.

⁷ See *ante*, § 155.

⁸ Freeman v. Alderson, 119 U. S. 187; Williams v. Armroyd, 7 Cranch, 423; Bradstreet v. Neptune Ins. Co.,

3 Sumn. 600; The Mary, 9 Cranch, 126; Peters v. Warren Ins. Co., 3 Sumn. 389; Propellor Commerce, 1 Black, 530; Crodson v. Leonard, 4 Cranch, 433; Averill v. Smith, 17 Wall. 95; Cooper v. Reynolds, 10 Wall. 316-321, cited in 1 Greenl. on Evid., § 541.

⁹ Graham v. Whitely, 2 Dutcher, 254; Robinson v. Jones, 8 Mass. 536; Maley v. Shattuck, 8 Cranch, 488; Gelston v. Hoyt, 3 Wheat. 246.

¹⁰ White v. Read, 24 N. Y. S. 290; Bradstreet v. Insurance Co., 3 Sumn. 600; Magoun v. N. E. Ins. Co., 1 Story, 157.

¹¹ Price v. Dewhurst, 8 Sim. 279.

ent with the law of nations, and that all parties having any interest *in rem* had notice and an opportunity to appear and to be heard personally or by a proper representative.¹

In regard to that class of judgments which are analogous to judgments *in rem* in that they are binding upon all persons within the jurisdiction, that is to say, judgments or decrees fixing the personal status of an individual, it has been held that where a judgment of this sort has been rendered in a foreign court or in the court of one state of the United States, it ought to be binding, so far as the person is concerned, in every country and in all the states of the Union.

So far as guardians, executors, administrators and others occupying similar positions are concerned, the decree of the court appointing them has in the United States no extraterritorial efficacy, and these *quasi*-fiduciaries are regarded as purely local matters. For this reason a judgment appointing a person an executor, administrator, guardian or trustee in one state is not evidence in the courts of another to show that he possesses any power as such over property in the latter state.²

The judgment of a court of competent jurisdiction confirming or annulling a marriage which had been contracted within its jurisdiction by residents or non-residents, or which had been contracted outside of its jurisdiction by persons who were at the time of the marriage or of the suit domiciled within its jurisdiction, is valid everywhere. The same rule is applied to a valid foreign decree granting a divorce in a suit conducted *bona fide* by persons actually domiciled in the jurisdiction of the court.³

The effect as evidence of foreign judgments *in personam* has been much discussed from early times by the authorities and in the decided cases. In spite of the contrariety of the cases, it may be safely said, in the first place, that a foreign judgment regular on its face, rendered in an action *in per-*

¹ *Gelston v. Hoyt*, 3 Wheat. 246; *Williams v. Armroyd*, 7 Cranch, 423. ³ *James v. James*, 81 Tex. 373; *Glaude v. Post*, 8 S. Rep. 884; 43 La.

² *Kraft v. Wickey*, 4 Cr. & J. 332; *Ann.* 861; *Davis v. Davis*, 22 N. Y. S. 191; 2 Misc. R. 549; *Hammond v. Hammond* (Ga., 1893), 16 S. E. Rep. 265. *In re Johnson* (Iowa, 1893), 54 N. W. Rep. 69.

sonam in a foreign court, is conclusive evidence between the parties or their privies of all facts which are directly or indirectly involved. This proposition, it will be seen, leaves the foreign judgment to be impeached and set aside if upon the face of the record of the foreign court its decision appears to be grossly repugnant to natural justice,¹ or was obtained by fraud, or if it appears that the court had no jurisdiction,² or misapprehended or refused to recognize the law of the country in which the subject-matter is situated.³ Thus, if a French court, construing a contract made in England, decides a question of English law which is an essential element in the ultimate judgment rendered, the judgment itself will be invalid as evidence in an English court if the foreign court misapprehends the true import of the English rule of law.⁴ If the foreign court has no jurisdiction, then its judgment is of course invalid.⁵

In some proceedings *in personam* the decree of the foreign court is effectual to transfer the title of the property not only as against the parties but against all persons, and this conclusively. Such proceeding are analogous to proceedings *in rem*, and a party who accepts the express or implied permission or invitation to intervene and submits his claim to the court will not be permitted to have the judgment re-opened in another court on the plea that he only intervened to save his property from forfeiture.⁶

¹ Boston I. R. Co. v. Hoit, 14 Vt. 92.

² Goulding v. Hoyt, 34 N. H. 143.

³ Scott v. Pilkington, 2 B. & S. 11; 8 Jur. 557; Crispin v. Daglioni, 9 id. 653; Simpson v. Fogo, 9 id. 403; Bank of Australasia v. Nias, 16 Q. B. 717; Ricardo v. Garcias, 12 Cl. & Fin. 368; Dunstan v. Higgins, 63 Hun, 631, cited in 1 Greenl. on Evid., § 546.

⁴ Novelli v. Rossi, 2 B. & Ald. 757.

⁵ Vanquelin v. Bouard, 9 L. T. (N. S.) 582. Cf. Wood v. Watkinson, 17 Conn. 500.

⁶ De Casse Brissac v. Rathbone, 6 H. & Nor. 301; Imrie v. Castrique, 8 C. B. (N. S.) 406; Frayes v. Worms, 10 C. B. (N. S.) 149; Simpson v.

Fogo, 6 Jur. 403; Woodruff v. Taylor, 20 Vt. 65. In Holmes v. Gratz (U. S. C. C., 1892), 50 Fed. Rep. 869, the court in refusing to allow defendant to plead a foreign judgment as a bar in a suit for an injunction held that foreign adjudications as respects torts are not conclusive, and that, as granting an injunction depends largely upon circumstances which differ in each case, neither public policy nor international comity requires that the right to the protection of a court of equity against fraud should depend on the law of a foreign tribunal.

§ 159. **Judgments of sister states.**—By virtue of the constitutional provision that full faith and credit shall be given to the judicial proceedings of each state in the courts of every other state, a judgment rendered in any state or territory will, when duly authenticated, have exactly the same effect and operation as a domestic judgment.¹ Still it is competent for the court, in such a case, to inquire whether the judgment is tainted with fraud or whether the court had jurisdiction of the subject-matter or of the parties.² So a court of one state may inquire whether a federal court situated in another state had jurisdiction to render a judgment offered as evidence in its courts;³ and in New York it has been held that the validity of a judgment rendered in another state may be attacked upon the sole ground that the cause of action was based on a contract without consideration and obtained under duress,⁴ or that the judgment has been allowed to become dormant in the other state.⁵ On the other hand, the validity of a judgment of another state cannot be impeached by showing that the cause of action was barred by the statute of limitation,⁶ or that the parties were not legally served.⁷

¹ *Bright v. Smitten*, 10 Pa. Co. Ct. R. 647; *Fitzsimons v. Johnson*, 90 Tenn. 416 (probate court); *Caughran v. Gilman*, 81 Iowa, 442; 46 N. W. Rep. 1005; *Semple v. Glenn*, 91 Ala. 245; 9 S. Rep. 265; *Hall v. McKay*, 78 Tex. 248; *Carpenter v. Strange*, 141 U. S. 87; *Chicago & A. B. Co. v. Anglo-American Packing Co.*, 46 Fed. Rep. 584; *McGarvey v. Darnall*, 134 Ill. 367; 25 N. E. Rep. 1005; *Kingman v. Paulsen*, 126 Ind. 507; *Bowersox v. Gitt*, 12 Pa. Co. Ct. R. 81; *Sannis v. Wightman* (Fla., 1893), 12 S. Rep. 526; *Hammond v. Hammond* (Ga., 1893), 16 S. E. Rep. 365. See, also, *ante*, § 148.

² *Taylor v. Bryden*, 8 Johns. 173; *First Nat. Bank v. Cunningham*, 48 Fed. Rep. 515; *Teel v. Yost*, 128 N. Y. 387; *Renier v. Hurlburt* (Wis., 1892), 50 N. W. Rep. 783; *Henry v. Allen*, 82 Tex. 35; *Rand v. Hansen*, 154

Mass. 87; 28 N. E. Rep. 6; *Caughran v. Gilman*, 81 Iowa, 442; 46 N. W. Rep. 1005; *Bogan v. Hamilton*, 90 Ala. 54; *New York L. Ins. Co. v. Aitkin*, 125 N. Y. 560; *Ifuntington v. Attrill*, 146 U. S. 657; *Morgan v. Morgan*, 1 Tex. Civ. App. 315.

³ *Hovey v. Elliott*, 21 N. Y. S. 108; *Southern Ins. Co. v. Wolverton Hd. Co.* (Tex., 1892), 19 S. W. Rep. 615.

⁴ *Trebilcox v. McAlpine*, 62 Hun, 317. But *cf. contra*, *Ambler v. Whipple*, 139 Ill. 311; 28 N. E. Rep. 841.

⁵ *Chapman v. Chapman*, 48 Kan. 636; 29 Pac. Rep. 1074.

⁶ *Fitzsimons v. Johnson*, 90 Tenn. 416; *Reed v. Chilson*, 61 Hun, 623.

⁷ *Hall v. McKay*, 78 Tex. 248; *Semple v. Glenn*, 9 S. Rep. 265; 91 Ala. 245. But *cf. N. Y. L. Ins. Co. v. Aitkin*, 125 N. Y. 660; *Hoffman v. Newell*, 20 N. Y. S. 432; 21 *id.* 912.

§ 160. Judgment in bar need not be pleaded.— An estoppel *in pais* or by deed should be specially pleaded in order to be admissible and conclusive as evidence, though where there is no opportunity to plead it it may be proved under the general denial.¹ A former judgment, when specially pleaded in bar, will operate as an estoppel in law and be binding alike on court and jury. But it has been considered doubtful whether a judgment not pleaded as an estoppel but given in evidence under a general denial or under the general issue was binding on the jury. The weight of the decisions, however, supports the proposition that if a former judgment is relied upon and is given in evidence as determining the whole question involved in the pending action, it need not be pleaded but is conclusive as an estoppel, and so binding as a matter of law upon the jury.²

¹ Outram v. Morewood, 5 East, 346; Harvey, 2 H. & Mun. 55; Shafer v. Adams v. Barnes, 17 Mass. 365; Dows Stonebraker, 4 G. & J. 345; Betts v. McMichael, 6 Paige, 139; Chamberlain v. Carlisle, 26 N. H. 540; Chase, 15 N. H. 9; Lawrence v. Hunt, Meiss v. Gill, 44 Ohio St. 258. 10 Wend. 83, 84; 1 Greenl. on Evid.,

² Krekeler v. Ritter, 62 N. Y. 372; § 531. *Contra*, Josephi v. Mady Marsh v. Pier, 4 Rawle, 288, 289; Clothing Co. (Mont., 1893), 33 Pac. Gray v. Pingry, 17 Vt. 419; Cist v. Rep. 10. *Cf.* Dunklee v. Goodenough Ziegler, 16 S. & R. 282; Preston v. (Vt., 1893), 26 Atl. Rep. 988.

CHAPTER XIV.

PRIVILEGED COMMUNICATIONS.

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| § 165. Foundation of the doctrine. | § 172. Permanent character of the privilege — Its waiver. |
| 166. Husband and wife, when competent witnesses. | 173. Privileges as to documents. |
| 167. Statutory legislation — Confidential communications. | 174. What communications are within the privilege. |
| 168. Confidential communications between husband and wife. | 175. Privilege of police — Judicial and executive officials. |
| 169. Communications to attorneys. | 176. Privilege as relating to jurors. |
| 170. Character and time of the communications. | 177. Confidential communications to clergymen. |
| 171. Attorney employed by both parties. | 178. Communications to physicians. |

§ 165. **Foundation of the doctrine.**—Public policy, the welfare of the whole community, and indeed the best interests of the litigant parties themselves, demand that certain evidence, or rather the evidence of certain witnesses, shall be absolutely inadmissible, because any advantage which might be gained in the particular case in ascertaining the truth would be more than counterbalanced by the injury to society as a whole. This restriction upon the capacity of certain classes of witnesses as regards the evidence which they will be permitted to give is not based upon any peculiar respect which the law has for their calling or character. Its design is to advance the pure and unembarrassed administration of law, subserve justice and to protect the innocent while punishing the guilty.¹

¹ "The principle of the rule which applies to attorneys and counsel is that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and exponents, both in ascertaining their rights in the country and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has

§ 166. **Husband and wife, when competent witnesses.**—A husband or wife was not at common law (with a few exceptions) a competent witness for or against each other in any action to which the other was a party or had any pecuniary interest.¹ The absolute prohibition thus placed upon the husband and wife was largely the logical result of the legal identity of the parties to the marriage. The rule that the party was not a competent witness for or against himself required the exclusion of the testimony of another person who was simply the *alter ego* of the party and equally concerned in the suit.² It was considered also that to permit a husband or wife to testify for the other would put a premium on perjury, while, if either were to be recognized as a competent witness against the other, the harmony between them and the unbounded confidence properly accompanying the marriage relation would be imperiled.³

So far as the rule was intended to protect confidential communications between husband and wife, it was analogous to the rule which at common law affixed a privileged character

considered it the wisest policy to encourage and sustain the confidence by requiring that on such facts the mouth of the attorney should be forever closed." Chief Justice Shaw, in *Hatton v. Robinson*, 14 Pick. 422.

¹ 1 Greenl. on Evid., § 334; *Bank v. Mandeville*, 1 Cranch, 575; *Gilleland v. Martin*, 3 McLean, 490; *Farrell v. Ladwell*, 21 Wis. 182; *Pryor v. Roburn*, 16 Ark. 671; *Moore v. McKee*, 13 Miss. 238; *Wilson v. Sheppard*, 28 Ala. 623; *Dawley v. Ayers*, 23 Cal. 108; *Manchester v. Manchester*, 24 Vt. 649; *Kemp v. Donhan*, 5 Har. (Del.) 417; *Cameron v. Fay*, 55 Tex. 38; *Waddams v. Humphreys*, 22 Ill. 661; *Karney v. Paisley*, 13 Iowa, 89; *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Gee v. Scott*, 48 Tex. 510; *Kyle v. Frost*, 29 Ind. 393; *Keaton v. McGivier*, 24 Ga. 217; *Tully v. Alexander*, 11 La. Ann. 628; *State v. Armstrong*, 4 Minn. 335; *Tomlinson v. Lynch*, 32 Mo. 160; *Kelly v. Proc-*

tor, 41 N. H. 139; *Rice v. Keith*, 63 N. C. 319; *Den v. Johnson*, 18 N. J. L. 87; *Bird v. Husten*, 10 Ohio St. 418; *Donnelly v. Smith*, 7 R. I. 12; *Gross v. Reddy*, 45 Pa. St. 406; *Footman v. Prendergass*, 2 Strob. Eq. (S. C.) 317.

² *Turner v. State*, 50 Miss. 351, 354.

³ *Lucas v. Brooks*, 18 Wall. (U. S.) 436, 452; *In re Alcock*, 12 Eng. L. & Eq. 354, 355; *Stapleton v. Crofts*, 18 Ad. & E. 367, 369; *Tully v. Alexander*, 11 La. Ann. 628; *Mitchinson v. Cross*, 58 Ill. 366, 369; *In re Dwelly*, 46 Me. 477, 480; *Blake v. Graves*, 18 Iowa, 312, 317; *Bradford v. Williams*, 2 Md. Ch. 1; *Turner v. State*, 50 Miss. 351; *Den v. Johnson*, 18 N. J. L. 87, 98; *Marsh v. Potter*, 30 Barb. (N. Y.) 506; *Gibson v. Com.*, 87 Pa. St. 253; *State v. Workman*, 15 S. C. 540, 546; *Cram v. Cram*, 33 Vt. 15, 40; *Dunlap v. Hearn*, 37 Miss. 471, 474; *Bowman v. Patrick*, 32 Fed. Rep. 368.

to the communications between client and attorney, and which, by statute, now regulates the relation of priest and penitent or physician and patient. Thus it is said that the incompetency of the husband or wife to testify for or against the other in a criminal prosecution arose, not from any identity of interest, but solely from principles of public policy growing out of respect for the confidential nature of the marital relation.¹ When, therefore, the interest of justice demanded that the mouth of the husband or wife should be opened, as in prosecutions of either for a crime committed on the other, an exception was recognized² from the necessity of the case, and the husband or wife was competent.³

A woman against whose husband an indictment has been found may testify for the state on the trial of another person for the crime;⁴ and the same rule has been applied where the husband was tried jointly with another, though it is the duty of the jury to consider her testimony only so far as it applies to the other defendant.⁵

§ 167. Statutory legislation — Confidential communications.—The competency of a wife or husband as a witness

¹Turpin v. State, 55 Md. 477; Stein v. Bowman, 13 Pet. (U. S.) 223; Turner v. State, 50 Miss. 351; In re Randall, 5 City Hall Rec. 141, 153; United States v. Jones, 32 Fed. Rep. 569; State v. Wright, 41 La. Ann. 600; Hussey v. State, 87 Ala. 121; Ex parte Hendrickson (Utah, 1889), 21 Pac. Rep. 396; Johnson v. State, 27 Tex. App. 135; State v. Adams, 40 La. Ann. 213.

²Bramlette v. State, 21 Tex. App. 611; 2 S. W. Rep. 875; People v. Sebring, 66 Mich. 705; 33 N. W. Rep. 808. In a trial of the husband for bigamy, his letters to his lawful wife are inadmissible (State v. Ulrich, 110 Mo. 350; Com. v. Caponi, 155 Mass. 534; Bassett v. United States, 137 U. S. 496), though it is held elsewhere that she is herself competent as a witness. United States v. Cutler, 19 Pac. Rep. 145; 5 Utah, 608.

³Stein v. Bowman, 13 Pet. 221; 1 Bl. Com. 413; Bentley v. Cooke, 3 Doug. (Eng.) 422; Whipp v. State, 34 Ohio St. 87, 89; State v. Neil, 6 Ala. 685; State v. Parrott, 79 N. C. 615; People v. Chegaray, 18 Wend. (N. Y.) 642; Goodwin v. State, 60 Ga. 509; State v. Bennett, 31 Iowa, 24; State v. Dyer, 59 Me. 503; Turner v. State, 50 Miss. 351, 354. A wife's dying declarations are admissible on a trial of her husband for her murder. State v. Belcher, 13 S. C. 459; Rex v. Woodcock, 2 Leach, 563; People v. Green, 1 Denio (N. Y.), 614; People v. Murphy, 45 Cal. 143.

⁴State v. Rainsbarger, 71 Iowa, 746; 31 N. W. Rep. 865; State v. Wright, 41 La. Ann. 600.

⁵State v. Adams, 40 La. Ann. 213; 3 S. Rep. 733.

for or against the other is to a large degree, if not altogether, regulated by statutes in the United States. These differ somewhat in details and should be consulted in every instance where this question arises. The general effect of this legislation has been to render the husband or wife competent as a witness for or against the other by removing any disqualification that either may have been under on account of the common-law merger of the legal personality of the wife into that of the husband because of the incompetency of a party to be a witness.¹ In civil cases, therefore, a husband or wife is a competent witness for or against the other to the same extent and with the same effect as any other person, with the exception (and this exception is recognized in all the states which have legislated upon this subject) that neither can be permitted to disclose confidential communications which passed between them during coverture. But statutes merely intended to render interested persons competent as witnesses do not affect the competency of husband and wife, as their incompetency is founded on other grounds than interest.²

The common-law incompetency of the husband or wife as a witness in the prosecution of either for a crime committed against a third party is confirmed by statute in many states;³ and where the statute in general terms declares that husbands and wives are competent and compellable to give evidence, it has been held to apply only to civil suits and never to criminal proceedings.⁴ The credibility of a husband or wife who

¹ *Collins v. Mack*, 31 Ark. 684; *Watkins v. Turner*, 34 Ark. 663; *Spitz's Estate*, 56 Conn. 185; *Beitman v. Hopkins*, 109 Ind. 178; *Parkhurst v. Berdell*, 110 N. Y. 386; *Warren v. Press Pub. Co.*, 132 id. 181; *Nilan v. Kalish* (Neb., 1893), 55 N. W. Rep. 295; *Briggs v. Briggs* (R. I., 1893), 26 Atl. Rep. 198; *Beale v. Brown*, 6 Mackey, 574.

² *Turpin v. State*, 55 Md. 462, 477.

³ *State v. McCord*, 8 Kan. 161; *United States v. Bassett*, 5 Utah, 131; 13 Pac. Rep. 237; *Meriwether v. State*, 81 Ala. 74; 1 S. Rep. 560; *Stickney v. Stickney*, 131 U. S. 227; *Johnson*

v. State (Tex., 1889), 11 S. W. Rep. 667; *Lowther v. State*, 4 Ohio Cir. Ct. R. 522. This privilege may be claimed by the defendant instead of by the witness. *People v. Wood*, 126 N. Y. 249; 27 N. E. Rep. 362.

⁴ *Turpin v. State*, 55 Md. 462, 478; *Wilke v. People*, 53 N. Y. 525; *Steen v. State*, 20 Ohio St. 333. *Cf. People v. Murphy*, 45 Cal. 143; *Miner v. People*, 58 Ill. App. 59; *State v. Sloan*, 55 Iowa, 217. The statutory provisions of the several states regulating the competency of a husband and wife as witnesses for or against each other are cited, and the subject of

has been made competent to testify for or against the other is to be tested precisely by the same rules as any other witness.¹

§ 168. Confidential communication between husband and wife.—Where a statute expressly enacts that a husband or wife is not *compellable* to divulge their communications, either may be permitted with the consent of the other to make a voluntary statement,² though the contrary is the rule where they are declared *incompetent* to testify.³ Where the communication is not confidential, and this will be presumed where it is made to a third person by the wife or husband in the other's presence,⁴ or where a third person is present, it will not be privileged,⁵ and the third party may testify to what he has heard, but sometimes it has been held that a communication need not be expressly confidential;⁶ as, for example, where

confidential communication between them is very thoroughly discussed by the editors of the fourteenth edition of Greenleaf on Evidence in a note to section 334 in volume 1. The list here appended is condensed from that note. The following statutes may be consulted: Arkansas Code, § 2859, cl. 4; California Code, § 1881; Crim. Code, § 1322; Colorado Gen. Laws, § 3649; Connecticut Statutes, § 1097; Florida Laws, ch. 101; § 23, Act 1891; § 4029; Georgia Code, § 3854; Illinois R. S., ch. 51, § 5; Indiana R. S., § 501; Iowa Code, §§ 3641, 3642; Kansas Gen. Stat., § 5280; Maine R. S., ch. 134, § 19, ch. 82, § 93; Maryland Gen. Laws, art. 35, § 1; Massachusetts Pub. Stat., ch. 169, § 18; Minnesota Statutes, § 5094; Mississippi Rev. Code, § 1601; Missouri R. S., § 8922; Montana Code Civ. Pro., § 649; Nebraska Code Civ. Pro. 328; Nevada Gen. Stat., § 3403; New Jersey Rev., vol. 1, p. 378, § 5; New York Code Civ. Pro., § 828; Ohio R. S., § 5241, ch. 3; Pennsylvania Laws 1887, ch. 89, § 2, cl. b; Texas R. S., art. 2247; Vermont R. S., § 1005; Virginia Rev. Civ. Code,

2281; West Virginia Code, ch. 150, § 22; Wisconsin Annot., § 7072.

¹ State v. Collins, 20 Iowa, 85; State v. Guyer, 6 id. 263; State v. Bernard, 45 id. 234.

² Southwick v. Southwick, 2 Sweeny, 234; Stickney v. Stickney, 131 U. S. 237.

³ Baldwin v. Parker, 99 Mass. 79; Brown v. Wood, 121 id. 137; Jacobs v. Hesler, 113 id. 157; Head v. Thompson, 77 Iowa, 263; Smith v. Turley, 32 W. Va. 14; Com. v. Cleary, 152 Mass. 491.

⁴ Griffin v. Smith, 45 Ind. 366; Mainard v. Beider, 2 Ind. App. 115; 28 N. E. Rep. 196.

⁵ Day v. Gidjum, 131 Mass. 81; Com. v. Griffin, 110 Mass. 181; State v. Carter, 35 Vt. 378; Howard v. Brewer, 37 Ohio St. 402; People v. Lewis, 62 Hun, 622; Lyon v. Prouty, 154 Mass. 488; Buckman's Will, 64 Vt. 313.

⁶ Dexter v. Booth, 2 Allen (Mass.), 559; Raynes v. Bennett, 114 Mass. 425; Com. v. Haynes, 145 id. 293; Leppla v. Minn. Tribune Co., 35 Minn. 311; Norris v. Stewart, 105 N. C. 455.

the statute in terms refers to *all communications* made during marriage.¹

A conversation between husband and wife is no less confidential and private because children were present who took no part in it.² The fact that husband and wife sue or are sued jointly does not remove the privilege as respects confidential communications,³ nor will the husband or wife be permitted to testify to any communications made while the marriage relation existed after its dissolution, whether by annulment, divorce or death.⁴ But either after the death of the other may now testify to any facts which he or she learned from other sources and not by reason of the marital relation, even though relative to a transaction of the decedent.⁵ If, however, the evidence of the other party to the suit is inadmissible because referring to a transaction with a decedent, the testimony of a wife is also inadmissible.⁶

It is sometimes provided by statute that, in the trial of any allegation founded upon adultery, neither husband nor wife shall be competent to testify against the other except to prove the fact of marriage or to disprove the adultery.⁷ So in an action to recover for criminal conversation, neither husband nor wife can testify for the other,⁸ though either being

¹ Low's Estate, Myrick's Prob. (Cal.) 143; Campbell v. Chase, 12 R. I. 333; Bird v. Hueston, 10 Ohio St. 418; Westernman v. Westernman, 25 id. 500; King v. King, 42 Mo. App. 454.

² Jacobs v. Hesler, 113 Mass. 157. So business communications are privileged. Com. v. Hayes (Mass., 1887), 14 N. E. Rep. 151; Mitchell v. Mitchell, 15 S. W. Rep. 705.

³ Buck v. Ashbrook, 51 Mo. 539; Tingley v. Conzill, 48 id. 291.

⁴ Hitchcock v. Moore, 70 Mich. 112; Stanley v. Montgomery, 102 Ind. 102; Stein v. Bowman, 13 Pick. 209, 223; French v. Ware (Vt., 1893), 26 Atl. Rep. 1096; Coffin v. Jones, 13 Pick. 441; Robin v. King, 2 Leigh, 142; Bigelow v. Sickles, 75 Wis. 528; Pat-ten v. Wilson, 2 Lea (Tenn.), 101; Estate of Lord, Myrick's Prob. (Cal.) 143; State v. Jolly, 3 Dev. & Bat. 110;

Cruse v. Rutledge, 81 Ill. 266; Barnes v. Camack, 1 Barb. 392; Cook v. Grange, 18 Ohio, 526; Brock v. Brock, 116 Pa. St. 113. When either party is deceased his written communication to the other cannot be used by a third person in a suit against the survivor. Mitchell v. Mitchell, 15 S. W. Rep. 705; 80 Tex. 101.

⁵ Coffin v. Jones, 13 Pick. 445; Wells v. Tucker, 3 Binn. 366; Williams v. Baldwin, 7 Vt. 506; Saunders v. Hendrix, 5 Ala. 224; Galbraith v. McLain, 84 Ill. 379; Romans v. Hay, 12 Iowa, 270, cited in 1 Greenl. on Evid., § 337.

⁶ Harriman v. Sampson, 23 Ill. App. 161; Trileavan v. Dixon, 119 Ill. 551; Barry v. Stevens, 69 Me. 290.

⁷ Michigan Annot. Stat., § 7543; Code N. C. 588; R. S. Ind. 1881, § 501.

⁸ Cross v. Cross, 55 Mich. 280; De Meli v. De Meli, 120 N. Y. 492.

a party may testify in his or her own behalf.¹ So a married woman has been permitted to testify in her own behalf to the fact of the non-access of her husband,² or that her husband had made certain representations to her upon the strength of which she had conveyed property to him,³ or that her husband had been intoxicated in her presence,⁴ or had communicated to her a venereal disease.⁵

§ 169. Communications to attorneys.—At common law an attorney cannot be compelled or allowed to disclose communications made by his client to him or his advice given in return in the course of his employment as an attorney.⁶ In nearly all the states this rule has been confirmed by statute, and it is sometimes provided that the privilege may be waived by the client.

A client may waive the privilege by conduct and by implication as well as by express declaration.⁷ Thus, if he request his attorney to act as a subscribing witness to his will he waives his privilege to that extent, and the attorney is then compellable to testify to the same facts as other subscribing witnesses.⁸ Such a request is tantamount to a declaration that he wishes to release the attorney from the professional

¹Smith v. Brien, 6 N. Y. S. 174.

²State v. McDowell (N. C.), 7 S. E. Rep. 785.

³Spitz's Appeal, 56 Conn. 184; 14 Atl. Rep. 776.

⁴Stanley v. Stanley (Ind., 1888), 13 N. E. Rep. 261.

⁵Polson v. State (Ind., 1893), 35 N. E. Rep. 907.

⁶Carter v. West (Ky., 1892), 19 S. W. Rep. 592; Aultman v. Ritter, 81 Wis. 395; 51 N. W. Rep. 569; Koontz v. Owens, 109 Mo. 1; 18 S. W. Rep. 928; Wadd v. Hazleton, 62 Hun, 602; Swain v. Humphreys, 42 Ill. App. 370; Loder v. Whelpley, 111 N. Y. 220; In re Coleman, 11 N. Y. 220; In re McCarthy, 65 Hun, 624; Chirac v. Reinecker, 11 Wheat. 295; Foster v. Hall, 12 Pick. 89; Mathews v. Hoagland (N. J., 1890), 21 Atl. Rep. 1054; Alexander v. United States,

138 U. S. 353. In *Pearse v. Pearse*, 1 De Gex & Sm. 28, 29, the court says: "Truth, like all other things, may have loved unwisely; may be pursued too keenly; may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultation with his legal adviser, the general evil of infusing reserve, dissimulation, meanness, suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price for truth itself."

⁷Willis v. West, 60 Ga. 613.

⁸In re Lumb's Will, 21 Civ. Pro. 324; Rousseau v. Blen, 31 N. Y. 177; In re Pitts (Wis., 1893), 55 N. W. Rep. 149; McMaster's Appeal, 55 id. 149; In re Coleman, 111 N. Y. 220.

privilege, and is equivalent to calling upon him to take the witness stand in his behalf.¹

The communication, to be privileged, must have been made to one who was actually occupying the position of legal adviser; but where a communication is made to an attorney who has been requested to act, it will be privileged though he subsequently refuses to do so.² The rule does not require any regular retainer, or any particular form of application or payment of a fee,³ provided the attorney is consulted with the actual intention of obtaining his professional services.⁴

A communication made to or advice received from the agent of the attorney is no less privileged than where the client communicates with the attorney directly. Thus, a clerk,⁵ interpreter,⁶ or other agent⁷ of the attorney will not be allowed to testify to communications made to him in a professional capacity by a client of his employer. But a third person present at a consultation between attorney and client, and who is not the medium of communication, may testify to what was said;⁸ and so generally any person who has been consulted either in a private or professional capacity in regard to any transaction may be compelled to testify if, at that time and in reference to that particular matter, he did not occupy the position of an attorney at law.⁹

¹ *McKinney v. Grand St. etc. R. R. Co.*, 104 N. Y. 352.

² *Peek v. Boone* (Ga., 1893), 17 S. W. Rep. 66; *Sargent v. Hampden*, 38 Me. 581; *McClellan v. Longfellow*, 33 id. 594.

³ 1 Greenl. Evid., § 241. *Cf.* *In re Monroe's Will*, 20 N. Y. S. 82; 2 Con. Sur. 395.

⁴ *Sargent v. Hampden*, *supra*.

⁵ *Sibley v. Waffle*, 16 N. Y. 180; *Jackson v. French*, 3 Wend. 837; *Hawes v. State*, 88 Ala. 68; *Taylor v. Forster*, 2 C. P. 195; *Bowman v. Norton*, 5 C. & P. 177; *Jardine v. Sheridan*, 2 C. & K. 24; *Landsberger v. Gorham*, 5 Cal. 450.

⁶ *Parker v. Carter*, 4 Munf. 273; *Andrews v. Solomon*, 1 Pet. C. C. 356.

⁷ *Parkins v. Hawkshaw*, 2 Stark. 1239; *Steele v. Stuart*, 1 Phil. Ch. 471; *Fenner v. London & S. E. Ry. Co.*, L. R. 7 Q. B. 767.

⁸ *Greer v. Greer*, 58 Hun. 251; *Tyler v. Hall*, 106 Mo. 313; *Goddard v. Gardner*, 28 Conn. 172; *Hoy v. Morris*, 13 Gray. 519.

⁹ *In re Monroe's Will*, 20 N. Y. S. 182; *Matthews' Estate*, 4 Am. Law Jour. 356 (conveyancer); *Schubkagel v. Dierstein*, 131 Pa. St. 53; *McLaughlin v. Gilmore*, 1 Ill. App. 563; *Brunger v. Smith*, 49 Fed. Rep. 124; *Holman v. Kimball*, 23 Vt. 555; *De Wolf v. Strader*, 26 Ill. 225; *Coon v. Swan*, 30 Vt. 6; *Borum v. Fouts*, 15 Ind. 50; *Sample v. Frost*, 10 Iowa, 266. So communications to one's confidential clerk or banker (*Mc-*

§ 170. Character and time of the communications.—In all classes of privileged communications claimed to be confidential certain elements must be present. It is only necessary to call attention to the fact that, as the communication must have been made during the existence of the confidential relation, anything said before or after is not within the rule. So the communication must have been made to the attorney, doctor or priest, not only during the existence of the connection but while he was acting in a professional capacity, and must have had relation to his professional employment.¹ So an attorney will be allowed to divulge the name of a person who retained him² and the date when he received a certain instrument;³ that he drew a deed⁴ for his client or paid money to his client⁵ or to a third person on his client's account.

So it has been held that whenever an attorney, though acting as such, obtains knowledge of any fact, not by reason of his professional character, but by his power of observation as a man or by means which any man in a like situation would employ, the information is not privileged.⁶

Manus v. Freeman, 2 Pa. Dist. R. 144) or steward are never privileged. 1 Greenl. Evid., § 248, citing *Hofman v. Smith*, 1 Caines, 157; *Vallaint v. Dodemead*, 2 Atk. 524. Where a person, though not admitted to the bar, has been accustomed for years to practice before justices of the peace, confidential statements made to him by an accused are under the rule. *Benedict v. State*, 11 N. E. Rep. 125; 44 Ohio, 679. But the mere presence of a third person will not make the attorney a competent witness. *Blount v. Kempton*, 155 M. & S. 378.

¹ *Grant v. Hughes*, 96 N. C. 177; 2 S. E. Rep. 339; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577; 32 N. W. Rep. 768; *Caldwell v. Davis*, 10 Colo. 481; 15 Pac. Rep. 696; *Sharon v. Sharon*, 79 Cal. 633; *Skellie v. James*, 81 Ga. 419; *Rogers v. Moore*, 88 id. 88.

² *Brown v. Payson*, 6 N. H. 443;

Gower v. Emery, 6 Shepl. 79; *Chirac v. Reinecker*, 11 Wheat. 280.

³ *Wheatley v. Williams*, 1 M. & W. 533. But *cf. contra*, *Ex parte Trustee*, 9 Morrell's Bank. Cas. 116.

⁴ *Barry v. Coville*, 7 N. Y. S. 36; *Rundle v. Foster*, 3 Tenn. Ch. 658; *Robson v. Kemp*, 4 Esp. 235.

⁵ *Chapman v. Peebles*, 84 Ala. 283; 4 S. Rep. 273.

⁶ *Wadd v. Hazelton*, 62 Hun, 603; *Swaine v. Humphreys*, 42 Ill. App. 370; *Harris v. Dougherty*, 74 Tex. 1; 11 S. W. Rep. 921; *Brennan v. Hall*, 14 N. Y. S. 864; *Sheldon v. Sheldon*, 58 Hun, 601; *In re Smith*, 61 Hun, 101; *Weaver's Estate*, 9 Pa. Co. Ct. R. 516; *Theisen v. Dayton*, 82 Iowa, 74; 47 N. W. Rep. 891. As a corporation acts only by agent, a confidential communication by the latter to the attorney of the corporation is within the rule (*Fire Ass'n v. Fleming* (Ga., 1888), 3 S. E. Rep. 420), though per-

§ 171. **Attorney employed by both parties.**—When an attorney is engaged by several parties to act or to advise in a transaction in which all are interested, communications made to him by any of them are not within the rule. He may be called to testify by any one of the parties in a subsequent suit between them as to such professional communications.¹ Some of the cases seem to confine the operation of this exception to communications made where the other parties to the transaction or suit were present,² and in such a case the attorney may testify, though at the time he was only acting for one party to the suit.³

§ 172. **Permanent character of the privilege—Its waiver.** The termination of the pending litigation or the severance of the relation of attorney and client by the death of the client or for any cause does not unseal the lips of the former as to communications passing between them while the connection existed.⁴ The privilege is designed to protect the client, and he may consequently waive it. So it has been held that this may be done after the death of the client by his representative, but only when an application of the rule would be to the disadvantage of his estate.⁵ While the client is living the priv-

haps this would not be so in the case of an agent acting for a natural person. So the regularly appointed attorney for a municipal corporation will not be compelled to divulge communications made to him professionally by a municipal board or officer. *People v. Gilon*, 18 Civ. Pro. R. 109.

¹ *Sparks v. Sparks* (Kan., 1893), 32 Pac. Rep. 892; *Michael v. Foil*, 100 N. C. 189; *In re Bauer*, 79 Cal. 312; *Gulick v. Gulick*, 39 N. J. L. 516; *Cady v. Walker*, 62 Mich. 157; *Lynn v. Lyerle*, 113 Ill. 134; *Hurlbut v. Hurlbut*, 128 N. Y. 420; *Hanlon v. Doherty*, 109 Ind. 37; *Tyler v. Tyler*, 126 Ill. 525.

² *Hurlbut v. Hurlbut*, 128 N. Y. 420; *Colt v. McConnell*, 116 Ind. 256; *Goodwin Company's Appeal*, 117 Pa. St. 537; *Hanlon v. Doherty*, 109 Ind. 37; *Smith v. Crego*, 7 N. Y. S. 86; *Hughes*

v. Boone, 102 N. C. 137; *Hard v. Ashley*, 63 Hun, 634; *Greer v. Greer*, 58 Hun, 251.

³ *Carey v. Carey*, 108 N. C. 267; *Deuser v. Walkup*, 43 Mo. App. 625; *Greer v. Greer*, *supra*; *In re Smith*, 61 Hun, 101; 15 N. Y. S. 425; *In re McCarthy*, 65 Hun, 624. But in a suit between strangers such communications would doubtless be privileged.

⁴ *Wilson v. Rastall*, 4 T. R. 759; *Morris v. Cain*, 39 La. Ann. 712; 1 S. Rep. 879; *Kant v. Kessler*, 114 Pa. St. 603; *Walter v. Fairchild*, 4 N. Y. S. 559; *Barry v. Coville*, 7 id. 36; 1 Greenl. on Evid., § 243.

⁵ *Layman's Wills*, 40 Minn. 372; *Morris v. Morris*, 119 Ind. 343; *Blackburn v. Crawford*, 3 Wall. 175; *Russell v. Jackson*, 15 Jur. 1117. *Contra*, *Loder v. Whelpley*, 111 N. Y. 245; *Westover*

ilege is wholly personal and cannot be waived by any other person merely because he stands in privity with the client;¹ on the other hand, while he is living his agent, or after his decease his personal representative, may, it seems, claim the privilege by which the attorney is prohibited from testifying.² The privilege is forever waived if immediate objection is not taken when the attorney or other professional person is examined³ as a witness, or where the client has disclaimed the existence of the relationship,⁴ or has called the attorney to testify to the tenor of such communications,⁵ or upon the stand himself discloses voluntarily the facts contained in his communications.⁶

§ 173. **Privilege as to documents.**—The attorney cannot be compelled to produce or disclose the nature of any writing which he has seen⁷ or which is in his possession belonging to his client.⁸ He will be permitted to testify that such documents exist, that he has searched for them, and that they are or are not in his custody, when it is sought to prove their contents by secondary evidence.⁹ A communication to an attorney acting in the capacity of conveyancer is privileged,¹⁰

v. Life Ins. Co., 99 id. 56. Cf. Valensin v. Valensin, 14 Pac. Rep. 397; 73 Cal. 106.

¹ State v. Jones, 13 S. E. Rep. 325; Bouman v. Norton, 5 C. & P. 177.

² Edington v. Mut. Life Ins. Co., 67 N. Y. 185. Cf. Pierson v. People, 79 N. Y. 424.

³ Hoyt v. Hoyt, 112 N. Y. 513.

⁴ In re Mellen, 63 Hun, 623.

⁵ Masterson v. Boyce, 6 N. Y. S. 65; McKinney v. Grand St. etc. R. R. Co., 104 N. Y. 355; Smith v. Crego, 7 N. Y. S. 86.

⁶ State v. Tall, 43 Minn. 276; People v. Gallagher, 75 Mich. 515; Hunt v. Blackburn, 9 S. Ct. 125; 128 U. S. 464. The fact that the client denies on the witness stand that he made a certain statement to his attorney will not authorize proof thereof by the latter's evidence. State v. James, 34 S. C. 579.

⁷ Arbuckle v. Templeton, 25 Atl. Rep. 1093.

⁸ Volant v. Soyer, 13 Q. B. 231; Mathews v. Hoagland, 48 N. J. Eq. 455; 21 Atl. Rep. 1054; Liggett v. Glenn, 51 Fed. Rep. 381.

⁹ Dale v. Livingstone, 4 Wend. 558; Jackson v. McVey, 18 Johns. 330; Brandt v. Klein, 17 id. 335; Mills v. Oddy, 6 C. & P. 728; Stokoe v. St. Paul M. & M. R. Co., 40 Minn. 546; Coveney v. Tannahill, 1 Hill, 33; Allen v. Root, 39 Tex. 589; Harrisburg Car Mfg. Co. v. Sloan (Ind., 1889), 21 N. E. Rep. 1088.

¹⁰ Bingham v. Walk, 27 N. E. Rep. 483; 128 Ind. 164; Crane v. Barkdoll, 59 Md. 534; Wilson v. Troup, 7 Johns. Ch. 25; Getzlaff v. Seliger, 43 Wis. 297; Mathews' Estate, 5 Pa. L. J. Rep. 149; O'Neill v. Murray, 6 Dak. 107. But *contra*, In re Smith, 61 Hun, 101; Brazel v. Fair, 26 S. C. 370; Caldwell

though he acts for both parties to the deed of conveyance.¹

§ 174. What communications are within the privilege.—In order that a communication to an attorney may be privileged it is not essential that any particular litigation, suit or other legal proceeding should be pending. If the relation of client and attorney exists it is sufficient; for, whatever the transaction may be, and whether or not it is likely to be subsequently litigated, the attorney will not be permitted to disclose the confidential communication or advice.² But a communication made by a client to his attorney in regard to a future infraction of the criminal law by the former, or advice given as to the means of evading the consequence of a criminal or fraudulent act which he *intends to commit*, is not privileged;³ nor is the mouth of the attorney closed as to communications or acts arising out of a conspiracy to defraud in which both attorney and client⁴ are participants. And the fact that the attorney is innocent of fraud, and ignorant of the wrongful use which his client intends to make of his ad-

v. Davis, 10 Colo. 481; O'Neill v. Murray, 6 Dak. 107; Thomas v. Griffen (Ind., 1890), 27 N. E. Rep. 754. Though it must be clearly shown that he acted as a scrivener only.

¹ Clay v. Williams, 2 Munf. 105, 122. It is for the court to determine in what capacity and for what purpose documents were deposited with an attorney (Reg. v. Jones, 1 Denio Cr. Cas. 166), and whether they are confidential and thus inadmissible. Amey v. Long, 9 East, 473; Reynolds v. Rowley, 3 Rob. (La.) 261; Batesen v. Hartsink, 4 Esp. 43; Hughes v. Boone, 102 N. C. 43. A client cannot avoid the production of papers not themselves privileged by depositing them with his attorney. Edison El. Co. v. U. S. Elec. Co., 44 Fed. Rep. 294.

² Minet v. Morgan, L. R. 8 Ch. 361; Penruddock v. Hammond, 11 Beav. 59; Belzhover v. Blackstock, 3 Watts, 20; Foster v. Hall, 12 Pick. 89, 92;

Pearse v. Pearse, 16 L. J. Ch. 153; Bingham v. Walk, 128 Ind. 164; 27 N. E. Rep. 483; In re McCarthy, 59 Hun, 626. The question whether an opinion rendered before a litigation was begun or after it was in contemplation, but without direct reference to it, or after it had been terminated and while no particular action was pending or contemplated, though much discussed in the early cases is now settled, and the privilege extends to all advice whenever given. For a full consideration on the point see 1 Greenl. on Evid., §§ 240, 240a.

³ Heckman v. Green (Mo., 1893), 22 S. W. Rep. 455; Russell v. Jackson, 15 Jur. 1117; Everett v. State (Tex., 1892), 18 S. W. Rep. 674; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Orman v. State, 22 Tex. App. 604.

⁴ People v. Sheriff, 29 Barb. 622; Mathews v. Hoagland, 48 N. J. Eq. 458; 21 Atl. Rep. 1054.

vice,¹ will deprive the interview of its professional character, as full confidence is withheld by the client. To destroy the privilege fraud must be clearly shown,² and the test of fraud in a civil suit is the issue arising from the pleadings.³ An attorney may testify that one alleged to be his client made no communication to him or received no advice,⁴ and he may repeat a statement made to him (though made while he was acting in a professional capacity) by a third person to whom he was referred by his client,⁵ or communications by the client which were intended to be imparted to other persons through the attorney,⁶ or a conversation between two persons in his presence, though both were his clients.⁷

As this privilege is designed for the client's protection, he cannot be compelled to disclose anything that passed between him and his attorney when, being a party to an action, he takes the witness stand in his own behalf.⁸ But an accomplice turning state's evidence may be compelled to disclose information which is contained in a communication to an attorney, as he is conclusively presumed to have waived all privileges.⁹

§ 175. Privilege of police, judicial and executive officials.

The administration of justice and the interest of society demand that information obtained by judicial or police officials in the detection or prosecution of crime should remain undivulged.¹⁰ This principle was recognized at common law, and

¹ *The Queen v. Cox*, L. R. 14 Q. B. D. 153; *Greenough v. Guskell*, 1 My. & K. 98; *Gartside v. Outram*, 26 L. J. Ch. 113; *Follett v. Jeffereyes*, 1 Sim. (N. S.) 3; *Orman v. State*, 22 Tex. App. 604; *Mathews v. Hoagland*, 48 N. J. Eq. 455.

² *Higbee v. Dresser*, 103 Mass. 523.

³ *Mathews v. Hoagland*, 48 N. J. Eq. 455; 21 Atl. Rep. 1054.

⁴ *Daniel v. Daniel*, 39 Pa. St. 191.

⁵ *In re Meller*, 63 Hun, 632.

⁶ *Ferguson v. McBean*, 91 Cal. 63; *Lloyd v. Davis*, 2 Ind. App. 170; *In re Meller*, 63 Hun, 632; *Galle v. Tode*, 26 N. Y. S. 633.

⁷ *In re Weaver*, 9 Pa. Co. Ct. R. 518.

⁸ *Barker v. Kuhn*, 38 Iowa, 395;

Bigler v. Reyher, 48 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *State v. White*, 19 Kan. 445; *Duttenhofer v. State*, 34 Ohio St. 91. *Contra*, *Woburn v. Henshaw*, 101 Mass. 193; *Montgomery v. Pickering*, 116 id. 227. *Cf.* *Durkee v. Leland*, 4 Vt. 612.

⁹ *Jones v. State*, 65 Miss. 179; 3 S. Rep. 379.

¹⁰ "Courts of justice, therefore, will not compel or allow the discovery of such information either by the subordinate officer to whom it is given, by the informer himself or by any other person without the permission of the government." *Per Gray, J.*, in *Worthington v. Scribner*, 109 Mass. 487.

no witness was compellable to disclose the name of an informer¹ or any communications which were made or act done relating to the detection of a crime, any farther than was needed to ascertain fairly and justly the guilt or innocence of the accused.² But the necessity or desirability of the disclosure of the information, in order to establish the innocence of the prisoner,³ or because public interest would suffer or be benefited, is one for the court to determine on all the circumstances of each particular case.⁴

Official communications, consultations and transactions between superior and subordinate executive or legislative officials are also within the rule of privilege.⁵ So an assessor of taxes will not be permitted to disclose as a witness in a suit between third persons the sworn statements made to him by the owners of property;⁶ nor will a witness be permitted to divulge a communication between the attorney-general and a United States district attorney,⁷ or between a military officer and his commander-in-chief,⁸ or between the president of the United States and the governor of a state commonwealth.⁹

Whether a member of a legislative body can be compelled to testify to what took place therein has been differently decided. In England it is held he cannot,¹⁰ though it was held that a senator of the United States may be compelled to testify to what took place in secret session when the senate refused to remove the bar of secrecy therefrom.¹¹

¹ *Attorney-General v. Briant*, 15 L. J. Exch. 265.

² *Vogel v. Gruaz*, 110 U. S. 311; *Rex v. Hardy*, 24 How. St. Tr. 753, 808; *Rex v. Watson*, 2 Stark. 136; *United States v. Moses*, 4 Wash. C. C. 726.

³ *Marks v. Beifus*, 25 Q. B. Div. 494.

⁴ *Reg. v. Richardson*, 3 F. & F. 693. This matter is now sometimes regulated by statute. Cal. Civ. Code, § 1881; Colo. Act 1883, p. 239; Minn. Stats., § 5094.

⁵ *Totten v. United States*, 93 U. S. 105.

⁶ *Witters v. Sowles*, 32 Fed. Rep. 130.

⁷ *United States v. Six Lots of Ground*, 1 Woods, C. C. 234.

⁸ *Home v. Bentinck*, 2 Brod. & Bing. 130; *Cooke v. Maxwell*, 2 Stark. 183.

⁹ *Gray v. Pentland*, 2 S. & R. 23; 1 Burr's Trial, pp. 186, 187.

¹⁰ *Chubb v. Salomons*, 3 C. & K. 75; *Plunkett v. Cobbett*, 29 How. St. Tr. 71, 72.

¹¹ *Law v. Scott*, 5 Har. & J. 438. The rule in England is thus stated by Sir James Stephen: "No one can be compelled to give evidence relating to any affair of state or as to official communications between public officers upon public affairs, except with the permission of the officer at the

§ 176. **Privilege as relating to jurors.**—In order to obtain freedom of discussion and to prevent the flight of suspected persons, the law requires that the proceedings of grand juries should be kept secret, though the jurors are not sworn to secrecy.¹ In the absence of statute prescribing when a grand juror may testify, unless his evidence is absolutely essential to protect private rights or advance public justice, he is not compellable to give evidence as to what passed in the jury-room.² It has been held that a grand juror may be compelled to testify to the number concurring in the indictment,³ or he may be called to show that the evidence of a witness on the trial is inconsistent with that given by him before the grand jury;⁴ to confirm the evidence of a witness,⁵ to point out irregularities in the indictment which are not due to misconduct of the grand jurors,⁶ or to show that the defendant was not examined as a witness before the grand jury.⁷ If the statute enumerates the cases in which a grand juror may testify he will not be permitted to do so in others.⁸

head of the department concerned, or to give evidence of what took place in either house of parliament, without the leave of the house, though he may state that a particular person acted as speaker." Stephen's Dig. Evid., art. 112.

¹ *People v. Reggel* (Utah, 1892), 28 Pac. Rep. 955; *Little v. Com.*, 25 Gratt. (Va.) 921; *United States v. Reed*, 2 Blatch. (U. S.) 435; *Com. v. Hall*, 65 Mass. 137.

² *State v. Oxford*, 30 Tex. 428; *State v. Hamlin*, 47 Conn. 114; *State v. Mewherter*, 47 Iowa, 88; *Kennedy v. Holladay*, 16 S. W. Rep. 688; 105 Mo. 24; *Creek v. State*, 24 Ind. 151; *Watts v. Territory*, 1 Wash. Ter. 409; *State v. Broughton*, 7 Ired. L. (N. C.) 96; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181, and cases *infra*. The secrecy of grand jury proceedings is due to the public alone, and is not a privilege of the witnesses who testify before it (*People v. Young*, 31 Cal. 568), or

of a person indicted. *People v. Reggel* (Utah, 1892), 28 Pac. Rep. 955.

³ *Low's Case*, 4 Me. 439; *Sparrenberger v. State*, 53 Ala. 481; *Cherry v. State*, 6 Fla. 679; *Com. v. Smith*, 9 Mass. 109; *People v. Shattuck*, 6 Abb. N. C. 33.

⁴ *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *Little v. Com.*, 25 Gratt. (Va.) 921; *Com. v. Mead*, 12 Gray (Mass.) 167; *State v. Fassett*, 16 Conn. 468; *United States v. Reid*, 2 Blatchf. 435; *State v. Wood*, 53 N. H. 484; *People v. Hulbut*, 4 Denio (N. Y.) 133.

⁵ *Pellum v. State*, 89 Ala. 28; *Perkins v. State*, 4 Ind. 222.

⁶ *People v. Briggs*, 60 How. Pr. 17.

⁷ *Com. v. Hill*, 65 Mass. 137.

⁸ *Com. v. Snowden* (Ky., 1892), 17 S. W. Rep. 205; *Burnham v. Hatfield*, 5 Black. (Ind.) 21; *Way v. Butterworth*, 106 Mass. 75; *Burdick v. Hunt*, 43 Ind. 381; *Heidekoper v. Cotton*, 3 Watts (Pa.) 56; *Ex parte*

In regard to traverse jurors, the general principle seems to be that they may testify to facts or communications referring to their individual acts while separated from their associates.¹ So they may testify to what third persons said or did to them as jurors. But the motives and reasons of the jurors and the transactions and communications between them relating to the subject-matter under their consideration as an official body and which were made in their capacity as jurors, whether in the jury-room or elsewhere,² are privileged, and to these the testimony of a juror is neither compellable nor allowable.³

§ 177. **Confidential communications to clergymen.**—The common law, while permitting the penitent to confess his shortcomings to his spiritual adviser, protected the former only to the extent that the clergyman was excused from re-

Sontag, 64 Cal. 525; *Sands v. Robison*, 12 Smed. & M. (Miss.) 854; *State v. Grady*, 84 Mo. 220. A state statute allowing grand jurors to testify is binding on federal courts sitting in that state. *Fotheringham v. Adams Ex. Co.*, 34 Fed. Rep. 646.

¹ *Harrington, etc. Co. v. Railroad Co.* (Mass., 1893), 32 N. E. Rep. 955.

² *Com. v. White*, 147 Mass. 76.

³ *State v. Freeman*, 5 Conn. 348; *Heffron v. Gallupe*, 55 Me. 563; *Woodward v. Leavitt*, 107 Mass. 455; *Rowe v. Canney*, 139 Mass. 41. *Cf.* *Tucker v. So. Kingston*, 5 R. I. 558; *Boston, etc. Corp. v. Dana*, 1 Grey, 83, 105; *Paige v. Chedsey*, 20 N. Y. S. 899; *Tenney v. Evans*, 13 N. H. 462; *Dane v. Tucker*, 4 Johns. 487; *Warren v. Spencer Water Co.*, 143 Mass. 155. So evidence by members of the jury that they agreed upon a verdict through ill-will toward a party (*Johnson v. Parrotte*, 34 Neb. 26; 51 N. W. Rep. 290), that third persons had conversed with them in the jury-room (*Gardner v. Minea*, 47 Minn. 295), or that a chance or quotient verdict was agreed on (*Moss v. Cen. Park R. R. Co.*, 23 N. Y. S. 23; *Crossdale v. Tan-*

tum, 6 Houst. (Del.) 218), is inadmissible. *Cf.* *Pawnee Ditch Co. v. Adams* (Colo., 1892), 28 Pac. Rep. 662; *Lift v. Lingane*, 17 R. I. 420; 22 Atl. Rep. 942; *State v. Dusenberry*, 112 Mo. 277; *State v. Plum*, 49 Kan. 279; *Mattox v. United States*, 146 U. S. 140; *State v. Best*, 111 N. C. 638; *Weatherford v. State*, 31 Tex. Crim. Rep. 530; *Flood v. McClure* (Idaho, 1883), 32 Pac. Rep. 254. In *Woodward v. Leavitt*, 107 Mass. 453, the court says: "The proper evidence of the decision of the jury is their verdict returned by them upon oath and affirmed in court, and it is essential to the freedom and independence of their deliberations that their discussions should be secret and inviolable. . . . The decisive reasons for excluding the testimony of jurors to the motives and influences which affected their deliberations are equally strong whether the evidence is offered to impeach or sustain their verdict." But a juror may testify that there were blood-stains on an article which was shown to the jury at a former trial. *Woolfolk v. State*, 85 Ga. 69.

porting the delinquent to the magistrate.¹ A communication or confession to a minister or priest was otherwise on a par with one to a layman, and the former might at common law be compelled to divulge any admission or confession² made to him in his professional capacity.³

At the present time in many states statutory provision has been made by which a clergyman or minister of any religion is prohibited from disclosing a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.⁴ So, too, it is often provided by statute that no person authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional capacity and which was necessary to enable him to prescribe for him as a physician or treat him as a surgeon.⁵

§ 178. Communications to physicians.—At common law a communication to a physician is not privileged, and however indiscreet a medical man may be in disclosing voluntary professional secrets, in a court of law he may be compelled involuntarily to do so.⁶ But this rule was never regarded with favor, and it was strongly intimated in a leading case⁷ that instances might arise when the fact that these matters were not privileged would be much lamented.

Every consideration of public policy that furnishes a basis

¹ *Butler v. Moore*, cited in *McNally*, Evid. 253, 254.

² In *Broad v. Pitt*, 3 C. & B. 518, the court says, *obiter*: "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence."

³ *Com. v. Drake*, 15 Mass. 161.

⁴ N. Y. Code Civ. Pro. 833; California Civ. Code, § 1881; Indiana R. S., § 497; Colorado Acts of 1883, p. 289; Michigan, Howell's Ann. St., § 7515; Kansas Gen. Stat., § 4418; Iowa Rev. Code, § 3643; Minnesota Stat., § 5094, ch. 3; Missouri R. S., § 8925; Ne-

braska Code, p. 672; Wisconsin Ann. Stat., § 4074; Ohio R. S., § 5241, ch. 1. Similar statutes have been passed in Arizona, Arkansas, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming. In the other states the common law still prevails.

⁵ See *supra*.

⁶ *Duchess of Kingston's Case*, 11 Harg. St. Tr. 243; 20 Howell's St. Tr. 643; *Rex v. Gibbons*, 1 C. & P. 97; *Broad v. Pitt*, 3 C. & P. 578; *Steageld v. State*, 24 Tex. 287; 3 S. W. Rep. 771.

⁷ *Wilson v. Rastall*, 4 Term R. 756.

for the privileged character of a communication by a client to an attorney is applicable in the relation of physician and patient. Aside from the protection thrown around the patient himself, the danger that truth will be perverted or concealed by the physician, perhaps unconsciously, in the struggle between professional honor and legal duty is entirely obviated.¹

As by the terms of the statute only such information or communications are privileged as the physician receives professionally, he will be allowed to testify to facts with which he has become acquainted in a non-professional capacity.² On the other hand, by the term "matter communicated to them in the course of their professional duties" is included all knowledge whether gained by the physician from his observation or the examination of the patient or from the latter's declarations.³ So the statute cannot be construed to prevent a physician from testifying to information which was not necessary to enable him to prescribe for the patient;⁴ as, for example, to the fact that he attended a person, the number of times he called,⁵ and the persons who were present when he called.⁶ The privilege is so far personal that it can only be waived by the patient⁷ or by his agent authorized to do so.

¹ *Patten v. U. L. & Acc. Ins. Co.*, 61 Hun, 627; *Freel v. Market St. etc. Co.* (Cal., 1893), 31 Pac. Rep. 730. A partuer of a physician who is present at a consultation between the former and a patient will not be permitted to divulge information thus acquired by him. *Ætna Ins. Co. v. Deming*, 123 Ind. 415.

² *In re Sliney*, 137 N. Y. 570; *Fisher v. Fisher*, 129 N. Y. 654; *In re Lowenstein*, 2 Misc. Rep. 323; *People v. Schuyler*, 106 N. Y. 303; *Viel v. Cowles*, 45 Hun, 307; *Brown v. Rome*, etc. R. R. Co., 45 Hun, 439.

³ *Heuston v. Simpson*, 17 N. E. Rep. 261; 115 Ind. 162; *Kling v. Kansas City*, 27 Mo. App. 231.

⁴ *Campau v. North*, 39 Mich. 606; *Cooley v. Foltz*, 48 N. W. Rep. 176.

⁵ *Patton v. Un. L. & Acc. Ass'n*,

133 N. Y. 450; *Brown v. L. Ins. Co.*, 65 Mich. 306; *Numrich v. Supreme Lodge*, 3 N. Y. S. 552; *Cooley v. Foltz*, 85 Mich. 47; 48 N. W. Rep. 176.

⁶ *Pandjiris v. McQueen*, 59 Hun, 625.

⁷ *Carrington v. St. Louis*, 89 Mo. 208; *Blair v. Railroad Co.*, 89 id. 334; *Valensin v. Valensin*, 73 Cal. 106; *McKinney v. Railroad Co.*, 104 N. Y. 352; 118 id. 77; *Record v. Village*, 46 Hun, 448; *Jones v. Brooklyn*, 3 N. Y. S. 353. A waiver by the insured binds the beneficiary. *Andrews v. Mut. R. L. F. Ass'n*, 34 Fed. Rep. 870. As to waiver by implication, see *State v. Depoister* (Nev., 1891), 25 Pac. Rep. 1000. A certificate of death made out by the attending physician and furnished as proof of death to an insurance company is not privileged.

After his death, in an action brought by or against his representative, the privilege may be invoked by the latter and a physician be prohibited from disclosing communications made to him while attending the deceased.¹ On the other hand, it has been held that the personal representative cannot waive the privilege and place the physician upon the stand to testify as regards communications made to him by the deceased.² The courts in laying down the rule that the privilege is absolute and cannot be waived by a representative of a deceased patient have proceeded on the supposition that the communication, if divulged, might tend to disgrace the memory of the deceased.³ But it has been held that communications made by the deceased to his physician were admissible in a trial for the murder of the patient, the disclosure in these cases being demanded to protect the community from the perpetration of secret crime⁴ and the communications containing nothing to disgrace the deceased's memory.⁵ So in probate cases,

Buffalo, etc. Co. v. Association, 126 N. Y. 450.

¹ Breisenmeister v. Sup. Lodge, 81 Mich. 525; Grattan v. Life Ins. Co., 80 N. Y. 281; Dilleber v. Mut. Life Ins. Co., 69 N. Y. 256; Cohen v. Cont. L. Ins. Co., 69 id. 308; Com. Life Ins. Co. v. Union Trust Co., 112 U. S. 254; Edington v. Mut. Life Ins. Co., 67 N. Y. 185; Staunton v. Parker, 19 Hun, 55.

² Westover v. Ætna L. I. Co., 99 N. Y. 57; In re Flint's Estate (Cal., 1893), 34 Pac. Rep. 863. See, also, the remarks of Ruger, C. J., in McKinney v. Grand St. R. R. Co., 104 N. Y. 352. *Contra*, Morris v. Morris, 119 Ind. 343; Thompson v. Ish, 99 Mo. 160; 12 S. W. Rep. 810. Where two physicians attend a patient, the fact that the latter puts one on the stand does not waive the privilege as to the other. Mellor v. Missouri P. R. Co., 105 Mo. 455; 16 S. W. Rep. 849. In New York the representative may now by statute waive the privilege except so far as communications ex-

pressly confidential are concerned and facts which would disgrace the memory of deceased. Laws 1891, ch. 381, p. 736. *Cf.* Gurley v. Park (Ind., 1893), 35 N. E. Rep. 279. If the privilege is waived at the first trial it may be claimed on a subsequent trial of the same issue. Breisenmeister v. Lodge, 81 Mich. 525.

³ Judge Earl in Pierson v. People, 79 N. Y. 434.

⁴ People v. Harris, 33 N. E. Rep. 65; 136 N. Y. 423.

⁵ Pierson v. People, 79 N. Y. 424; People v. Harris, 136 N. Y. 423. But *cf. contra*, People v. Brewer, 53 Hun, 217. But it has recently been held that as the statute was not designed to protect murderers, a physician might testify to the fact that he removed a dead *fœtus* from the deceased, and that at that time the defendant stated to him that he had performed an operation on her, she being his wife and he being on trial for her subsequent homicide. It may be observed that this testimony was

where a question arises as to the capacity of the testator, neither the proponent nor contestant of the will is permitted to examine a physician who attended him professionally as regards information thus acquired.¹

While the statute should receive a liberal construction, it is nevertheless the true rule that any objection to the testimony of the physician should be promptly interposed before his reply has been elicited.² Where the relation of physician and patient exists, it is immaterial that the former was not summoned by the patient but by some relative, friend or bystander.³ So, usually, it will be presumed that any information imparted was given for the purpose of aiding the physician in subscribing for the patient.⁴ Where a physician is sent to examine the mental or physical condition of a person with a view to determining his sanity, the information thus gained, exclusive of all information which he may have acquired of the prisoner personally, is not privileged. The physician may testify to the condition of mind or body in which he found the prisoner.⁵

§ 178a. Telegrams are not privileged.—Reasoning from the privileged character which has been conferred by act of congress upon letters and other communications which are carried in the mails, it has been suggested to and urged upon the courts that a telegraph company and its employees occupy a confidential relation towards the sender of the telegram,

obviously calculated to disgrace the memory of the patient. *People v. Harris*, 136 N. Y. 423.

¹ *Renihan v. Dennin*, 103 N. Y. 577; *Loder v. Whelpley*, 111 id. 245; *Coleman's Will*, 111 id. 225; *Heuston v. Simpson*, 115 Ind. 62. Cf. *In re Neill's Estate*, 7 N. Y. S. 197; *Hoyt v. Hoyt*, 112 N. Y. 493; *Herrington v. Winn*, 14 N. Y. S. 612; *Brigham v. Gott*, 3 N. Y. S. 518, as regards testimony of physician as to declarations of testator not made to him professionally. An objection to the evidence of a physician must be made prior to its reception or it will be waived. *Breisenmeister v. Lodge*, 81 Mich. 525. If the qualification of the

witness to practice medicine is not objected to at the trial it will be presumed by the appellate court that he was properly licensed. *Village v. Record*, 46 Hun, 448.

² *Hoyt v. Hoyt*, 112 N. Y. 513.

³ *Renihan v. Dennin*, 103 N. Y. 577.

⁴ *Feeney v. L. I. R. R. Co.*, 116 N. Y. 380; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 297; *Renihan v. Dennin*, 103 id. 573; *Kling v. Kansas City*, 27 Mo. App. 231.

⁵ *People v. Kimmler*, 119 N. Y. 585; *People v. Schuyler*, 12 N. E. Rep. 783; 7 N. Y. Crim. R. 262; *People v. Sliney*, 137 N. Y. 570. Cf. *In re Benson*, 16 N. Y. S. 111.

and that they should not be permitted or compelled to divulge any information which is contained in any message delivered to them for the purpose of transmission. The statute referred to is limited in its operation to mail matter alone, and could not, by the most liberal construction, be held to include telegraphic dispatches. In the absence of any statutory provision creating a different rule, the operator or other agent of the telegraph company will be compelled by a *subpoena duces tecum* to produce the telegrams in his possession;¹ or he may be compelled to testify orally to the contents of a dispatch where the absence of the writing itself is satisfactorily accounted for:²

¹ *Ex parte Brown*, 72 Mo. 83; *National Bank v. National Bank*, 7 W. Va. 544.

² *State v. Litchfield*, 58 Me. 267.

CHAPTER XV.

EXPERT AND OPINION EVIDENCE.

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| <p>§ 185. Definition.</p> <p>186. Matter of common knowledge — Opinions of non-experts, when admissible.</p> <p>187. Expert evidence, when admissible.</p> <p>188. Competency and examination of experts.</p> <p>189. Cross - examination of experts — Use of scientific books as evidence.</p> <p>190. The weight and credibility of expert and opinion evidence.</p> <p>191. Compensation of expert witnesses.</p> <p>192. Physicians as experts — Cause of death.</p> | <p>§ 193. Evidence of medical experts to show character of disease and blood-stains — Expert evidence as to autopsies and malpractice.</p> <p>194. Non-expert evidence upon a person's physical condition.</p> <p>195. Chemists as experts — Poisons.</p> <p>196. Expert evidence where sexual crimes have been committed — Abortion.</p> <p>197. Expert and non-expert evidence upon insanity.</p> <p>198. Mechanical experts.</p> <p>199. Expert evidence as to value.</p> <p>200. Underwriters as experts.</p> <p>201. Experiments in and out of court.</p> <p>202. Physical examination of the party by experts.</p> |
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§ 185. Definition.—"An expert is a person who possesses peculiar skill and knowledge upon the subject-matter on which he is called to testify;"¹ and expert evidence is evidence which

¹State v. Phair, 48 Vt. 366. For other cases defining the word, see Dole v. Johnson, 50 N. H. 454; Overby v. Chesa. & Ohio Ry. Co., 37 W. Va. 524; Nelson v. Sun Ins. Co., 71 N. Y. 453; Bird v. State, 21 Gratt. (Va.) 800; Dickenson v. Fitchberg, 13 Gray, 546; Mobile L. Ins. Co. v. Walker, 58 Ala. 290; Hyde v. Woolfolk, 1 Iowa, 166; Heald v. Thwing, 45 Me. 394; Toomes' Estate, 54 Cal. 514; Travis v. Brown, 43 Pa. St. 12; Buffum v. Harris, 5 R. I. 250; Congress, etc. Co. v. Edgar, 99 U. S. 657. Whether study and experience are both required, or whether either alone is sufficient to constitute an expert, depends upon the circumstances of the case. Ardesco Oil Co. v. Gilson, 63 Pa. St. 146. In some cases it has been held that a witness whose knowledge was gained by study alone or by conversation with persons familiar with the subject was not an expert. Railroad v. Finlay (Kan., 1888), 16 Pac. Rep. 951; Hass v. Marshall (Pa., 1888), 14 Atl. Rep. 421; Wickes v. Light Co., 70 Mich. 322. *Contra*, Fort Wayne v. Coombs, 107 Ind. 75; Fordyce v.

is given by such a person upon matters that are not within the range of men of ordinary knowledge and observation. Witnesses, as a general rule, must testify to facts. To permit them to state their opinions, or their conclusions or inferences drawn from facts, is to invade the province of the jury. Many exceptions to the rule are recognized where the facts, from their peculiar nature, cannot be properly described to the jury or understood or appreciated by them.

§ 186. Matter of common knowledge — Opinions of non-experts, when admissible.— Where the matter or transaction under consideration is such that all the facts can be intelligibly ascertained by men of average mental training or intelligence, where no peculiar skill, experience or knowledge is required to form an opinion,— in other words, where the facts are such as come within the knowledge, observation and judgment of ordinary men,— opinion evidence is not admissible.¹ In such case a witness who is called to testify to facts within his own knowledge should not be allowed to state his inferences, his beliefs or his mental impressions which are not recollections of facts, or to give his conclusions as to the legal consequence of facts.² If, however, the witness, in testifying to a conclu-

Moore (Tex., 1893), 22 S. W. Rep. 235. On the other hand, experience in many cases being necessarily all that can be had, is enough to make one an expert. But the court may refuse to hear an expert witness where, though experienced in his profession or trade, his general intelligence is of a low order. Broquet v. Tripp, 36 Kan. 700; 14 Pac. Rep. 227.

¹ Overby v. C. & O. R. Co., 37 W. Va. 524; Bergquist v. Iron Co., 49 Minn. 511; 52 N. W. Rep. 136; Man. Acc. Ind. Co. v. Dorgan, 58 Fed. Rep. 945; Reeves v. State (Ala., 1892), 11 S. Rep. 296; Kauffman v. Maier, 94 Cal. 269; Sappenfield v. Main St. etc. Co., 91 Cal. 48; Ill. Cent. R. R. Co. v. People (Ill., 1893), 33 N. E. Rep. 173; Toledo, etc. Co. v. Jackson (Ind., 1893), 32 id.

793; St. Louis, etc. Co. v. Yarrow, 56 Ark. 612; Stowe v. Bishop, 58 Vt. 498; Penn. R. R. Co. v. Conlan, 101 Ill. 93; Brinkley v. State, 89 Ala. 34; Milw. etc. Co. v. Kellogg, 94 U. S. 469; Avery v. Railroad Co., 121 N. Y. 31.

² Richardson v. Stringfellow (Ala., 1894), 14 S. Rep. 283; Lovejoy v. Hart (Minn., 1894), 57 N. W. Rep. 57; Dove v. Royal Insurance Co. (Mich., 1894), 57 id. 30; Shifflet v. Morell, 4 S. W. Rep. 453; 68 Tex. 382; Johnson v. Glover, 121 Ill. 483; 10 N. E. Rep. 214; 12 id. 257; Half v. Curtis, 5 S. W. Rep. 451; 68 Tex. 640; Tait v. Hall, 12 Pac. Rep. 391; 71 Cal. 449; Meade v. Carolina Bank, 26 S. C. 608; Barre v. Reading City Pass. Ry. Co., 26 Atl. Rep. 99; 155 Pa. St. 170; Lyts v. Keevey, 5 Wash. St. 606; 32 Pac. Rep. 534; Larson v.

sion of law, also states facts which are sufficient to enable the jury to draw their own conclusion, if they believe his statements of fact to be true, the error in permitting the admission of the conclusion is cured.¹

Where the question at issue is whether a person exercised reasonable diligence, care or skill, or whether machinery or a building was in a safe condition, and the facts are such that any man having common knowledge, experience or education is capable of forming a just conclusion upon the facts as they are narrated, the opinion of a witness, whether expert or non-expert, is inadmissible, as the question of negligence is for the jury alone.²

On the other hand, if negligence is alleged in the use of any implement, article or thing which is so far outside of the knowledge of persons of ordinary intelligence that they are incompetent to draw correct inferences from the facts, or if the facts are such that they cannot properly be described unless the opinion of the witness is also stated, then an expert or non-expert witness, respectively, may give an opinion as to a person's care, diligence or skill.³

Lombard Inv. Co. (Minn., 1893), 53 N. W. Rep. 179; Frezinski v. Newborg, 43 Ill. App. 406. As sustaining the proposition that conclusions of law are not admissible as evidence, see Thompson v. Brannin (Ky., 1893), 21 S. W. Rep. 1057; Huntsville v. L. S. & M. S. R. Co. (Ala., 1893), 12 S. Rep. 295; Wolf v. Arthur (N. C., 1893), 16 S. E. Rep. 843; Stepp v. Nat. L. & Maturity Ass'n (S. C., 1893), 16 S. E. Rep. 134; Johnson v. Crotty, 22 N. Y. S. 753; Cogshall v. Roller Miller Co., 48 Kan. 480; Tenney v. Harvey, 63 Vt. 520.

¹ Adams v. Main, 3 Ind. App. 232; Langworthy v. Green, 88 Mich. 207; Penn. Coal Co. v. Friend (Ind., 1892), 30 N. E. Rep. 1116.

² Yeaw v. Williams, 15 R. I. 20; Ft. Worth & D. C. R. Co. v. Thompson (Tex., 1893), 21 S. W. Rep. 137; Cross v. Railroad Co., 69 Mich. 363;

Girard v. Kalamazoo (Mich., 1893), 52 N. W. Rep. 1021; Johnston v. Oregon S. L. & U. N. Co. (1893), 31 Pac. Rep. 283; Kendrick v. Central R. R. Co., 89 Ga. 782; Butler v. Chicago, etc. Co. (Iowa, 1893), 54 N. W. Rep. 208; Illinois, etc. Co. v. Blye, 43 Ill. App. 612; Fisher v. Railroad Co., 22 Oreg. 533; Brunker v. Cummins (Ind., 1893), 32 N. E. Rep. 732; Helton v. Alabama Midland Ry. Co. (Ala., 1893), 12 S. Rep. 276; Nosler v. Chicago, B. & Q. R. Co., 73 Iowa, 268; Louisville, etc. Co. v. Chaffin, 84 Ga. 519; Louisville, E. & St. L. Cent. R. Co. v. Berry (Ind., 1894), 35 N. E. Rep. 565; Mauer v. Ferguson, 17 N. Y. S. 349; Bergquist v. Iron Co., 49 Minn. 511.

³ See *post*, §§ 189, 194. See, also, Pullman Pal. Car Co. v. Hawkins, 55 Fed. Rep. 932; Weber Wagon Co. v. Kehl, 139 Ill. 644.

It is difficult at times to distinguish clearly whether a question calls for an expression of opinion or for a statement of fact from the witness. The form of the question or of the answer is not always a reliable test. Thus, a witness may be asked if he has any doubts concerning the facts of a transaction to which he has testified, this question not calling for an expression of opinion, but merely seeking to ascertain the certainty of his knowledge.¹ So, where a witness is unwilling or unable to swear positively what any article was which he has examined or tested — that is, if he cannot readily identify it or classify it from a physical perception of its qualities, — he may be asked what he thinks it was.² If the witness, through excess of caution, qualifies his replies by expressions such as "it appears to me,"³ "I think," "I believe," or "should judge," his testimony, though perhaps weakened thereby, is not rendered incompetent. So far as his evidence contains statements of relevant facts, it is admissible though thus qualified.⁴ On the other hand, a witness' statement that he does not think a fact is true is not an opinion, for witnesses are not always required to state facts with positiveness.⁵ Testimony showing the ownership⁶ or size of the subject of litigation,⁷ or the time which elapsed between two events,⁸ or the opinion of the witness that a writing read by him is true,⁹ is not objectionable as an expression of opinion. But the opin-

¹ *State v. Duncan* (Mo., 1893), 22 S. W. Rep. 699; *King v. Railroad Co.*, 72 Mo. 607.

² *Com. v. Moinehan*, 140 Mass. 463.

³ *People v. Fanshawe*, 19 N. Y. S. 865.

⁴ *Abb. Brief on Facts*, § 192, citing *Guiterman v. Steamship Co.*, 9 Daly (N. Y.), 119; *Bradley v. Second Ave. R. R. Co.*, 8 id. 239; *Callahan v. N. Y., Lake Erie & W. R. R.*, 102 N. Y. 194; *People v. Rolfe*, 61 Cal. 540; *State v. Babb*, 76 Mo. 501; *Rich v. Jones*, 9 Cush. (Mass.) 326; *Prior v. Diggs* (Cal., 1893), 31 Pac. Rep. 155.

⁵ *Prior v. Diggs* (Cal., 1893), 31 Pac. Rep. 155.

⁶ *Slemer v. Trantum*, 13 S. Rep. 365.

⁷ *Oslin v. Jerome*, 93 Mich. 186; *Bass Fur. Co. v. Glasscock*, 82 Ala. 452; *Romack v. Hobbs* (Ind., 1893), 32 N. E. Rep. 307. "Duration, dimension, size, velocity, etc., are often to be proved only by the opinion of witnesses, depending as they do on minute circumstances which cannot fully be detailed by witnesses." *State v. Folwell*, 14 Kan. 205.

⁸ *Campbell v. State*, 23 Ala. 41; *State v. Casey*, 44 La. Ann. 969.

⁹ *Furton v. N. Y. Recorder*, 22 N. Y. S. 766; 3 Misc. Rep. 314; *Liscomb v. Agate*, 22 N. Y. S. 126; 67 Hun, 638.

ion of the witness who is not an expert as to the meaning of a sign, as the shaking of the head,¹ or of an outcry,² or generally as to the probable cause or effect of a certain relevant act,³ or as to the probable amount of time required for its performance,⁴ whether a witness could have heard a conversation,⁵ or a certain signal if it had been given,⁶ whether an accident was more likely to occur in one place than in another,⁷ or whether a certain act was prudent,⁸ is inadmissible.

Though non-expert witnesses are usually confined to testifying to facts, there are some cases where, from necessity, their opinions are admissible upon matters of common knowledge.⁹ If the facts to which the witness is called to testify are so numerous and of so peculiar a nature that they are incapable of being specifically described so as to bring out clearly their proper force and significance before the jury, the witness may state his opinion as a short-hand characterization of the facts.¹⁰ So where a witness had adequate means

¹ *Rollwagen v. Rollwagen*, 3 Hun, 121; 63 N. Y. 504.

² *Mesner v. People*, 45 N. Y. 1.

³ *Gardner v. State* (Ga., 1893), 17 S. E. Rep. 86; *Friedenwald v. Baltimore*, 74 Md. 116; 21 Atl. Rep. 555; *Kendrick v. Central R. R. Co.*, 89 Ga. 782; *Middlebrook v. Zapp*, 79 Tex. 321; *Ireland v. Cincinnati, etc. Co.* (Mich., 1890), 44 N. W. Rep. 426; *People v. Rector*, 19 Wend. 569; *Kansas, etc. Co. v. Scott*, 1 Tex. Civ. App. 1.

⁴ *Dowdy v. Georgia R. R. Co.*, 88 Ga. 726; *Parrott v. Swaim*, 29 Ill. App. 266.

⁵ *People v. Holfelder*, 5 N. Y. Crim. R. 179.

⁶ *Eskridge v. Railroad Co.*, 89 Ky. 367; 12 S. W. Rep. 580; *East Tenn. etc. Co. v. Watson*, 90 Ala. 41; 7 S. Rep. 813.

⁷ *Toledo S. & S. etc. Co. v. Jackson* (Ill., 1893), 32 N. W. Rep. 793; *Ivory v. Town of Deer Park*, 116 N. Y. 476; *Betts v. Gloversville*, 8 N. Y. S. 795.

⁸ *Murtaugh v. N. Y. Cent. & H. R. R. Co.*, 49 Hun, 456.

⁹ *Elliott v. Van Buren*, 33 Mich. 49; *People v. Monteith*, 73 Cal. 7; *Davis v. State*, 78 Ind. 15; *Blake v. People*, 73 N. Y. 586; *Yahn v. Otumwa*, 22 Am. Law Reg. 644; *Knoll v. State*, 55 Wis. 249; *Baltimore v. Lib. Turnp. Co.*, 66 Md. 419; 7 Atl. Rep. 805; *Whittier v. Franklyn*, 46 N. H. 23.

¹⁰ *Welch v. Miller*, 32 Ill. App. 110; *State v. Miller*, 53 Iowa, 84; *Livingston v. Metro. R. R. Co.*, 18 N. Y. S. 203; *Pike v. State*, 49 N. H. 399; *Adams v. People*, 63 N. Y. 621; *Carter v. Carter*, 37 Ill. App. 219; 28 N. E. Rep. 948; *Com. v. Cunningham*, 104 Mass. 545; *Fulcher v. State*, 28 Tex. App. 465; *East Tenn. R. Co. v. Watson*, 90 Ala. 41; 7 S. Rep. 813; *Atchison R. Co. v. Miller*, 18 Pac. Rep. 486; 39 Kan. 419; *B. & O. R. Co. v. Rambo*, 59 Fed. Rep. 75; *Indianapolis v. Huffer*, 30 Ind. 235; *Chicago, etc. Co. v. George*, 19 Ill. 510; *Irish v. Smith*, 8 S. & R. 573;

of observing a transaction, but where it is impossible for him so to reproduce it as to enable any one hearing his description to form an intelligent conclusion from what he is able to relate, the witness may, after stating the facts, be allowed to state his own opinion or the conclusion he has formed from the facts within his knowledge.¹ Thus, a witness may testify to his understanding of a conversation;² that, in his opinion, a certain noise which was made by running water frightened a horse;³ that a horse was gentle,⁴ or appeared frightened⁵ or tired;⁶ that a person's manner in answering questions was short;⁷ that a man was at a certain date intoxicated⁸ or was a person of intemperate habits;⁹ that a person looked like a white woman;¹⁰ that a man was destitute,¹¹ or that he was sober.¹² So any witness may testify in court to the apparent age¹³ or to the identity of a person or thing seen by him out of court.¹⁴

State v. Babb, 76 Mo. 501; *Alexander v. Jonquil*, 71 Ill. 366; *Porter v. Pequonnoc*, 17 Conn. 249.

¹ *Taylor v. B. & O. R. Co.*, 10 S. E. Rep. 29; 33 W. Va. 39; *Cavendish v. Troy*, 41 Vt. 99. "A variety of circumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion might be formed. The person who had witnessed the transaction could alone form any idea of the subject that could be relied on with safety." *Stewart v. State*, 19 Ohio, 302.

² *Garvin v. Gates*, 73 Wis. 513; 41 N. W. Rep. 621; *Printup v. Mitchell*, 17 Ga. 558. But he cannot testify to the legal effect of what was said. *Ives v. Hamlen*, 59 Mass. 534.

³ *Yahn v. Ottumwa*, 60 Iowa, 429; *Whittier v. Franklin*, 46 N. H. 23.

⁴ *State v. Avery*, 44 N. H. 392; *Sydenham v. Beckwith*, 43 Conn. 9.

⁵ *Com. v. Sturtivant*, 117 Mass. 122.

⁶ *State v. Ward*, 17 Atl. Rep. 483 (Vt., 1889).

⁷ *Carroll v. State*, 23 Ala. 28.

⁸ *McKillop v. Duluth St. Ry. Co.* (Minn., 1893), 55 N. W. Rep. 739; *Cole v. Bean*, 1 Ariz. 377; *People v. Monteith*, 73 Cal. 7; *People v. Eastwood*, 14 N. Y. 562; *Bradley v. Railroad Co.*, 8 Daly (N. Y.), 289; *McCarty v. Wells*, 51 Hun, 171; *Hampson v. Taylor*, 15 R. I. 83; *State v. Pierce*, 65 Iowa, 85; *People v. O'Neil*, 112 N. Y. 355.

⁹ *Gallagher v. People*, 120 Ill. 179; *United Breth. M. Aid Ins. Co. v. O'Hara*, 120 Pa. St. 256; 13 Atl. Rep. 932; *Gahagan v. Railroad Co.*, 1 Allen, 187; *Smith v. State*, 55 Ala. 1; *Tatum v. State*, 63 id. 150.

¹⁰ *Hopkins v. Bowers*, 111 N. C. 175; *Moore v. State*, 7 Tex. App. 603.

¹¹ *Antanger v. Davis*, 32 Ala. 703.

¹² *People v. Pakenham*, 115 N. Y. 200.

¹³ *Jones v. State* (Tex., 1893), 23 W. Rep. 349; *Carr v. State*, 24 Tex. App. 562; *State v. Douglas*, 48 Mo. App. 39.

¹⁴ *Com. v. Sturtivant*, 117 Mass. 112; *State v. Horr* (W. Va., 1893), 17 S. E. Rep. 794; *Brotherton v. People*, 75 N. Y. 159; *State v. Dickson*,

Again, a non-expert witness may testify to the disposition of a person, *i. e.*, that he is unreliable;¹ that on certain occasions he manifested hatred or anger,² or affection,³ towards himself or some other person, or looked wild and excited,⁴ or sad,⁵ or was happy and in good spirits.⁶ So, also, it is allowable for a non-expert to testify that in his opinion a culvert⁷ or a highway⁸ was or was not in good repair; that a trespass was committed in an insulting manner;⁹ that a blow, which caused a physical injury, came from a certain direction;¹⁰ that the weather was very cold;¹¹ that ill-feeling existed between certain persons;¹² that a train was running at a specific rate of speed,¹³ and that liquor which he had examined was intoxicating.¹⁴

§ 187. Expert evidence, when admissible.—Where the subject of investigation is such that persons who have not made it a special study, or who have had no peculiar training or experience in it, are incompetent to form accurate conclusions or opinions regarding it, experts may be called to state their opinions to the jury. Where the relation of facts to each other, their connection with each other, and their results or the conclusions which may be drawn from them, can be determined without any prior special experience, study or skill, the opinions of experts are inadmissible. So expert evidence will not be received to show that a road is necessary;¹⁵ that

78 Mo. 438; *People v. Rolfe*, 61 Cal.

540; *State v. Babb*, 76 Mo. 501.

¹ *Mills v. Winter*, 94 Ind. 329.

² *State v. Edwards* (N. C., 1893), 17 S. E. Rep. 521; *State v. Shelton*, 94 Iowa, 333.

³ *McKee v. Nelson*, 4 Cow. (N. Y.) 355.

⁴ *Trav. Ins. Co. v. Sheppard*, 85 Ga. 751.

⁵ *Culver v. Dwight*, 6 Gray, 444.

⁶ *State v. Baldwin*, 36 Kan. 1.

⁷ *Lund v. Lynsborough*, 9 Cush. (Mass.) 36.

⁸ *Clinton v. Howard*, 42 Conn. 294; *Balt. & Lib. Turnp. Co. v. Cassell*, 66 Md. 419; *Alexander v. Mt. Sterling*, 71 Ill. 366.

⁹ *Raisler v. Springer*, 38 Ala. 703.

¹⁰ *Hopt v. Utah*, 120 U. S. 430.

¹¹ *Curtis v. Chicago, etc. Co.*, 18 Wis. 312.

¹² *Polk v. State*, 62 Ala. 237.

¹³ *Pence v. Chicago, R. I. & P. Ry. Co.* (Iowa, 1890), 44 N. W. Rep. 686; *Com. v. Malone*, 114 Mass. 295; *State v. Folwell*, 14 Kan. 105. So it may be shown by one witness that a train was running rapidly at a place not too remote from the point in issue, and by another witness that its speed was not subsequently reduced. *Louisville, New Albany, etc. Co. v. Jones*, 108 Ind. 55.

¹⁴ *Com. v. Donlican*, 114 Mass. 257; *State v. Miller*, 53 Iowa, 84.

¹⁵ *Burwell v. Speed*, 104 N. C. 118; 10 S. E. Rep. 152.

the condition of machinery might necessitate an examination;¹ how much bark or wood will shrink;² or to explain the injury which has been done to property by smoke, noise and stench caused by the running of a railroad,³ as such matters are usually within common experience.

The expert witness need not know personally anything of the facts of the particular case, though perhaps his evidence would be of higher value if he could testify of his own knowledge as well as state his opinion upon facts in a hypothetical question which are assumed to be proved. It must appear, however, from his previous experience and study, or from his business or professional avocation, that he is qualified to answer the question more accurately than is a person who may not have been called upon to study the subject or to obtain or exercise any skill in it.⁴

§ 188. Competency and examination of experts.—Whether a witness is qualified to testify as an expert is always a question for the court,⁵ and his competency and title to act as an expert must be shown before his opinion is admissible.⁶ It is

¹ *Goodsell v. Taylor*, 41 Minn. 207.

² *Brown v. Doubleday*, 61 Vt. 523;
⁷ *Atl. Rep.* 135.

³ *Thompson v. Penn. R. Co.*, 15
Atl. Rep. 833; 51 N. J. L. 42.

⁴ *Overby v. C. & O. R. R. Co.*, 37
W. Va. 524; *Lawrence v. Myrieman*
Marble Co., 1 Misc. Rep. 105; *St.*
Louis, I. M. & S. Co. v. Lyman (Ark.,
1893), 22 S. W. Rep. 170; *Alabama*
Coal Co. v. Pitts (Ala., 1893), 13 S.
Rep. 35; *Muldowney v. Ill. Cent. R.*
Co., 36 Iowa, 472; *American En.*
Tile Co. v. Reich, 12 N. Y. S. 927;
Litton v. Wright, 1 Ind. App. 92;
27 N. E. Rep. 329; *In re Thompson*,
58 Hun, 608; *Perry v. Jensen*, 21
Atl. Rep. 866; 28 W. N. C. 126;
People v. McQuaid, 85 Mich. 123; 48
N. W. Rep. 161; *Rochester, etc. Co.*
v. Budlong, 10 How. Pr. (N. Y.) 239;
Kennedy v. People, 39 N. Y. 245.

⁵ *McEwen v. Biglow*, 40 Mich. 215;

Nelson v. M. Ins. Co., 71 N. Y.

453; *Broquet v. Tripp*, 36 Kan. 700;
Wright v. Williams, 47 Vt. 222; *Dole*
v. Johnson, 50 N. Y. 452; *Flynt v.*
Bodenhamer, 80 N. C. 205; *Santa*
Clara v. Enright, 95 Cal. 105; *Per-*
kins v. Stickney, 132 Mass. 217;
Gates v. Chicago, etc. Co., 44 Mo.
App. 488; *People v. Levy*, 71 Cal.
618; *Chateaugay O. & I. Co. v.*
Blake, 144 U. S. 476. See *ante*,
§§ 11, 13.

⁶ *People v. Millard*, 5 Crim. L.
Mag. 588; *Russell v. Crittenden*, 53
Conn. 564; *Half v. Curtis*, 68 Tex.
640; 5 S. W. Rep. 541; *Stennett v.*
Penn. Ins. Co., 68 Iowa, 674; *Ft.*
Wayne v. Coombs, 107 Ind. 75;
Forbes v. Howard, 4 R. I. 364; *Penn-*
sylvania Co. v. Swan, 37 Ill. App.
83; *McCormick M. Co. v. Burandt*,
37 id. 588. Cf. *Taft v. Com.* (Mass.,
1893), 33 N. E. Rep. 1046.

not always essential that the witness should expressly claim to be an expert.¹ It is usually enough if his competency appears *prima facie*, and if, on cross-examination, his utter lack of qualification as an expert is shown, the jury should be instructed to reject his evidence altogether.²

A hypothetical question in which are contained the facts which are proved or claimed to be proved by either side may be put to the expert for the purpose of obtaining his opinion.³ The facts embodied in the hypothetical question need not be absolutely proved or admitted.⁴ If there is any evidence which tends to prove the facts, it is proper to allow the counsel for either party to base a hypothetical question upon them, leaving it to the jury to decide ultimately whether the facts as stated are true.

The term "hypothetical" implies that the truth of some statement of fact is assumed for a particular purpose; and if such a question could be based upon undisputed facts alone, it would never be asked in any case where an issue of fact

¹ Mercer v. Vose, 40 N. Y. Super. Ct. 218.

² Davis v. State, 35 Ind. 496; People v. Marseilles, 70 Cal. 98; Redell v. Railroad Co., 44 N. Y. 367; Washington v. Cole, 6 Ala. 212; Perkins v. State, 132 Mass. 217; Sarle v. Arnold, 7 R. I. 582. If a witness is competent as an expert on a question relating to a particular business or profession, the fact that he has abandoned it and is now engaged in something else is not a valid objection to his competency. Abbott, Brief on the Facts, § 580; Bearss v. Copley, 10 N. Y. 93; Robertson v. Knapp, 35 N. Y. 91; 33 How. Pr. (N. Y.) 309. In deciding upon the competency of a witness to speak as an expert, the court may examine other witnesses for the purpose of aiding it in determining whether the alleged expert has the proper qualifications from experience or otherwise

to give an opinion as to the matter, or in the trade or profession in relation to which he was examined. Rogers, Exp. Test., § 17; Lawson, Exp. Ev. 236. In such a case the witness who is examined as to the qualification of the expert does not give an opinion as to the value of the testimony, *i. e.*, its credibility and weight, which are for the jury exclusively, but merely testifies that the expert possesses, in his opinion, sufficient experience and knowledge to entitle him to testify as such. Laras v. Com., 84 Pa. St. 208; Buehler v. Reich, 18 N. Y. S. 115. *Cf. contra*, Association v. Cronin, 4 Allen, 141.

³ People v. Harris, 136 N. Y. 423; Strong v. Stevens, 62 Wis. 255; Dexter v. Hall, 15 Wall. 9.

⁴ Hall v. Rankin (Iowa, 1893), 154 N. W. Rep. 217.

arose.¹ The question should not be based on conjecture,² or upon the opinions of other experts who have testified,³ nor should it contain conclusions and inferences, which are for the jury;⁴ but if it state and assume the material facts,⁵ the hypothetical question need not state all facts of which any evidence has been given.⁶ It is always objectionable to put lengthy hypothetical questions, containing numerous facts which require the witness to 'determine whether they have or have not been proved,⁷ or which are so prolix that neither he nor the jury can remember or consider what they contain.⁸

¹ *Cowley v. People*, 82 N. Y. 464; *Dilleber v. Home L. Ins. Co.*, 87 N. Y. 79; *Goodwin v. State*, 96 Ind. 550; *Page v. State*, 61 Ala. 16; *Yardley v. Cuthbertson*, 108 Pa. St. 395; *Quinn v. Higgins*, 63 Wis. 664; *Deig v. Morehead*, 110 Ind. 451; 11 N. E. Rep. 458; *Boardman v. Woodman*, 47 N. H. 120; *Dexter v. Hall*, 15 Wall. 9; *State v. Cross*, 68 Iowa, 180; *People v. Augsburg*, 97 N. Y. 501; *Forsyth v. Doolittle*, 120 U. S. 73; *Morrill v. Tegarden*, 19 Neb. 534; *Ray v. Ray*, 98 N. C. 566; *Foster's Ex'r v. Dickerson* (Vt., 1892), 24 Atl. Rep. 253; *Senn v. Southern Ry. Co.*, 18 S. W. Rep. 1007; *Carpenter v. Bailey*, 94 Cal. 406; *Russ v. Wabash W. Ry. Co.*, 112 Mo. 45; *Williams v. Brown*, 28 Ohio St. 158.

² *Prentis v. Bates*, 88 Mich. 567; *Higbie v. Guardian, etc. Co.*, 53 N. Y. 63.

³ *Link v. Sheldon*, 136 N. Y. 1; *In re Lyddy's Will*, 3 N. Y. S. 636.

⁴ *Haish v. Payson*, 107 Ill. 365.

⁵ *State v. Hanley*, 34 Minn. 430; *Vosburgh v. Putney*, 80 Wis. 523; *Thompson v. Knickerbocker Ice Co.*, 6 N. Y. S. 7; *Covey v. Campbell*, 52 Ind. 158. He should be asked to express his opinion upon certain facts specifically stated and assumed to be established, leaving it to the jury to find whether the facts thus assumed are true. *Woodbury v.*

Obear, 7 Gray (Mass.), 467. "An expert may be asked his opinion upon a case hypothetically stated, or upon a case in which the facts have been established; but he may not determine from the evidence what the facts are to give an opinion upon them." *Dexter v. Hall*, 15 Wall. 9, 26.

⁶ *Goodwin v. State*, 96 Ind. 550; *Baker v. State*, 30 Fla. 41; *Bowen v. Huntington*, 35 W. Va. 682; *Fort Worth, etc. Co. v. Greathouse*, 82 Tex. 104.

⁷ *Stoddard v. Town*, 33 N. E. Rep. 948.

⁸ *People v. Brown*, 53 Mich. 531; *Briggs v. Minn. S. R. Co.* (Minn., 1893), 53 N. W. Rep. 1019; *Prentis v. Bates*, 88 Mich. 567. An objection to the length of a question may be avoided by putting it to the expert in writing (*Jones v. President, etc. Portland*, 88 Mich. 598. See *Barton v. Govan*, 116 N. Y. 658), and the court may, in its discretion, require this to be done. *Mayo v. Wright*, 63 Mich. 32. The length of a hypothetical question is never ground for its exclusion, being a matter discretionary with the court, unless it is shown the jurors were confused and that they failed to understand it. *Forsyth v. Doolittle*, 120 U. S. 73; *Mayo v. Wright*, *supra*.

Though hypothetical questions constitute the best, and in some states the only,¹ method of ascertaining the opinion of an expert, it has been held that he may be asked to give an opinion upon the evidence if he has heard or read it,² and assuming it to be true,³ or he may give an opinion based upon his own personal knowledge gained by observation and examination of an injured person or of the subject-matter of the action.⁴ If, however, the evidence is very voluminous,⁵ or conflicting,⁶ this method would be objectionable, if not improper, as usurping the office of the jury.⁷

In the cross-examination of experts much latitude is allowed. So while, on the direct examination, no hypothetical question is admissible which is not within the general range of the evidence, or which assumes the truth of facts which are wholly unsupported by any evidence,⁸ when the expert is cross-examined he may be questioned to ascertain his skill or experience on subjects material to the inquiry, though the facts which are assumed in the questions may not have been contained in the evidence.⁹

¹ *McCarthy v. Com.* (Ky., 1893), 20 S. W. Rep. 229; *State v. Maier*, 36 W. Va. 757; *Reynolds v. Robinson*, 64 N. Y. 389; *In re Snelling*, 136 N. Y. 515.

² *Gilman v. Stafford*, 50 Vt. 723.

³ *Sillar v. Brown*, 9 C. & P. 601; *Com. v. Rogers*, 7 Met. (Mass.) 500; *Jones v. Chicago, etc. Co.*, 43 Minn. 279; *Hunt v. Lowell Gas Co.*, 8 Allen (Mass.), 170.

⁴ *State v. Leabo*, 89 Mo. 247; *Coyne v. Man. R. Co.*, 62 Hun. 620. *Contra*, *Fuller v. Jackson*, 92 Mich. 197. See *post*, § 189.

⁵ *Bennett v. State*, 57 Wis. 69.

⁶ *Guiterman v. Liverpool, etc. Co.*, 83 N. Y. 358; *Balt. & Lib. Co. v. Cassell*, 66 Md. 419; *Yardley v. Cuthbertson*, 108 Pa. St. 395; *Fairchild v. Bascomb*, 35 Vt. 308, 415; *Page v. State*, 61 Ala. 16.

⁷ *Gregory v. New York, L. E. etc. Co.*, 55 Hun. 303.

⁸ *State v. Cross*, 68 Iowa, 180; *People v. Augsburg*, 97 N. Y. 501.

⁹ *Dilleber v. Home L. Ins. Co.*, 87 N. Y. 79; *People v. Augsburg*, 97 N. Y. 501; *Louisville R. Co. v. Falvey*, 104 Ind. 409; *Kelly v. Erie Tel. Co.*, 34 Minn. 321; *Epps v. State*, 102 Ind. 539; *Brown v. Insurance Co.*, 70 Iowa, 390; *Hart v. Hudson R. B. Co.*, 84 N. Y. 56; *Foster's Ex'r v. Dickerson*, 64 Vt. 233; 24 Atl. Rep. 353. An expert may give an opinion upon the skill of another expert who has testified to show the value of his evidence. *Thompson v. Ish* (Mo., 1889), 12 S. W. Rep. 510. As to the extent and efficacy of cross-examination to test the knowledge of a witness and the credibility of his evidence, see *post*, §§ 339-342. The court should not permit the expert to be asked on cross-examination what is the amount of his annual professional income with a

§ 189. Cross-examination of experts—Use of scientific books.—While the current of the most recent decisions, in the absence of statute permitting it,¹ is against allowing scientific treatises to be read as furnishing direct evidence themselves of the opinions and facts which they contain, or as supplementary to and illustrating the oral evidence of the expert,² yet a particular scientific publication may be read to contradict the evidence of an expert where his opinion, as it was given on his direct-examination, is stated to be based upon that work;³ or it may be read to impeach him by showing that he quoted it incorrectly.⁴ The rule that scientific publications are not admissible in evidence does not of course prevent their use as a means of ascertaining the learning and competency of the expert. They may be referred to on cross-examination, and the expert may be asked if he has read them; if he agrees with the conclusions of their authors; and questions based upon their contents may be asked him.⁵

view to ascertaining his professional standing. *Harland v. Lilienthal*, 53 N. Y. 438.

¹ Code Iowa, § 3653. See, also, *Burg v. Chicago, R. I. & P. Co.* (Iowa, 1894), 57 N. W. Rep. 680.

² *People v. Goldenson*, 76 Cal. 328; *Com. v. Brown*, 121 Mass. 70; *In re Sheldon*, 18 N. Y. S. 15; *State v. O'Brien*, 7 R. I. 336; *Bloomington v. Schrock*, 110 Ill. 221; *Mix v. Staples*, 63 Hun, 631; *Huffman v. Click*, 77 N. C. 55. See, also, § 145. "The reasons for not admitting scientific works to prove the statements which they contain are that the authors did not write under oath, and their grounds of belief and process of reasoning cannot be tested by cross-examination. But an expert's opinion, formed in part from reading treatises written by persons of acknowledged ability, may be given in evidence, and he (the expert) may refresh his own recollection by reference to such authorities." By the

court, in *State v. Baldwin*, 36 Kan. 17, 18. See, also, *Marshall v. Brown*, 50 Mich. 148; *Boyle v. State*, 57 Wis. 472, 478; *People v. Vanderhoof* (Mich., 1888), 39 N. W. Rep. 28. Thus, herd-books will be rejected where the question of the breed of animals is in issue (*Crawford v. Williams*, 48 Iowa, 249), unless they are shown to be accepted and received as standard and well-recognized authorities. In such a case they may perhaps be used to refresh the memory of an expert on the witness stand. *Kuhns v. Chicago, etc. Co.*, 65 Iowa, 528; 22 N. W. Rep. 661; *Townley v. Missouri Pac. R. Co.*, 89 Mo. 31.

³ *Pinney v. Cahill*, 48 Mich. 584; *People v. Goldenson*, 76 Cal. 328; *Conn. L. Ins. Co. v. Ellis*, 89 Ill. 516.

⁴ *Ripon v. Bittel*, 30 Wis. 614.

⁵ *Hess v. Lowrey*, 122 Ind. 233; *State v. Wood*, 53 N. H. 484; *Tompkins v. West*, 56 Conn. 585.

§ 190. **The weight and credibility of expert and opinion evidence.**—The credibility and weight of expert and opinion evidence are for the jury exclusively,¹ and they are not required to give any greater weight to it than to other evidence,² and of course are not bound by it if they disbelieve it.³ It has been held error for the court to discredit expert evidence⁴ by instructing a jury that it should be regarded with caution,⁵ that its value was not great,⁶ or that less weight should be given to the evidence of an expert whose experience was limited⁷ than to that of one of greater experience. On the other hand, it has been held not improper for the court to declare that this evidence is of the lowest order; that it is the least satisfactory, and should not be permitted to overthrow positive and credible evidence of credible witnesses who testify of their own knowledge.⁸ These diverse views may perhaps be reconciled by remembering that expert evidence has for its peculiar province matter of opinion, and facts pertaining to subjects not within the scope of common knowledge. Within these limits the evidence of an expert possesses very great weight. If while testifying to such facts and opinions he shall also testify to matters of common knowledge, his character as an expert does not render his testimony as to *those matters* more credible than the testimony of any other person, while the fact that he is paid to testify casts a certain amount of discredit upon whatever he may say.⁹

¹Head v. Hargrave, 105 U. S. 45; Gregor v. Annell, 2 Iowa, 30; Epps v. State, 102 Ind. 529; State v. Cole, 63 Iowa, 695. See *ante*, §§ 11, 13. A physician's neglect to call a surgeon to perform an operation which he was himself unable to undertake should not be permitted to affect his credibility as an expert witness. Alabama G. S. R. Co. v. Hill, 93 Ala. 514.

²Sanders v. State, 94 Ind. 147; Turnbull v. Richardson, 37 N. W. Rep. 499; 69 Mich. 400.

³State v. Malloy, 31 Fed. Rep. 19; Humphries v. Johnson, 20 Ind. 190; Olson v. Gyertsen, 42 Minn. 407.

⁴Langford v. Jones, 18 Oreg. 307.

It is not error for the court to omit to inform the jury that a witness is an expert where it has charged them as to what is expert testimony. Faulkner v. Faulkner, 84 Ga. 73.

⁵Stone v. Chicago, etc. Co. (Mich.), 33 N. W. Rep. 24.

⁶Eggers v. Eggers, 57 Ind. 461.

⁷Cuneo v. Bessoni, 63 Ind. 524.

⁸United States v. Pendergast, 32 Fed. Rep. 198; Winans v. Railroad Co., 21 How. (U. S.) 101; Tracy Peerage Case, 10 C. & F. 191; People v. Perryman (Mich., 1888), 40 N. W. Rep. 425; Whitaker v. Parks, 42 Iowa, 586.

⁹St. Louis Gas Co. v. American F. I. Co., 33 Mo. App. 348.

§ 191. **Compensation of experts.**—An expert witness, called to testify to his opinion, is entitled to compensation over and above the fees allowed other witnesses by law; and it has been held that a district attorney, in employing expert witnesses to testify at a criminal trial, has, by implication, the authority to bind the county to pay a stipulated and specific sum as fees.¹ If he refuse to testify unless his fee is paid, he cannot be committed for contempt. But he may be in contempt where he refuses to answer questions which call for knowledge which he has acquired, not by his professional reading or experience, but by means open to any one—that is, by personal observation.² The compensation of an expert cannot, in the absence of statute, be taxed as costs.³

¹ *People v. Board of Supervisors of Cortland Co.*, 15 N. Y. S. 748; *People v. Board of Columbia Co.*, 31 N. E. Rep. 322; 134 N. Y. 1.

² *State v. Teipner*, 36 Minn. 535; *Buchman v. State*, 59 Ind. 1; *United States v. Howe*, 12 Cent. L. J. 193; *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207, 240; *Parkinson v. Atkinson*, 31 L. J. (N. S.) C. P. 199; *Dills v. State*, 59 Ind. 15. In *Ex parte Dement*, 53 Ala. 389, and *Summer v. State*, 5 Tex. App. 365, the right to extra compensation was denied. See, also, the remarks of Marle, J., in *Webb v. Page*, 1 Carr. & K. 23.

³ *Mask v. Buffalo* (N. Y., 1893), 13 N. E. Rep. 251; *Haynes v. Mosher*, 15 How. Pr. 216; *Branfoot v. Hamilton*, 52 Fed. Rep. 390; 3 C. C. A. 155. Upon the controverted question whether a witness called as an expert can be punished for contempt in refusing to testify until his fees as a professional expert witness are paid, the following considerations have been urged:

As sustaining the proposition that experts can be coerced into testifying without extra compensation, it is said that it is a duty that an expert, particularly if he belong to one

of the learned professions, owes to the law which protects him in the practice of his calling; that he, equally with all citizens, ought to contribute his aid from the necessity of the case and to secure and advance the proper administration of justice; and that the receipt of large sums as compensation is likely to bias the witness and to lessen, if not wholly to destroy, the value of his testimony as a guide to truth.

In answer to these arguments it is urged that, while a physician or other expert ought to testify to those facts within his knowledge which he has acquired by the means that are open to the ordinary witness without extra pay, yet, when giving a professional opinion on the witness stand, he is employing professional qualifications which it has taken him years of study to obtain, and that to compel him to divulge his opinion *gratis* is an unjust appropriation of his property without compensation.

Speaking of medical experts—and the same principles will apply to experts of any sort—Mr. John Ordronaux, in *Medical Jurisprudence*, par. 114, 115, says: “But once put upon

§ 192. **Physicians as experts—Cause of death.**—A medical witness may, if called as an expert, express his opinion as to the health of a person founded on an examination,¹ or upon the facts as stated in a hypothetical question put to him in court. But a physician called to testify, not as an expert, but in the capacity of an ordinary witness testifying to facts obvious to all, cannot on cross-examination testify as an expert.² If his opinion is founded upon a physical examination of the person, he may be guided in part by statements made to him by the patient so far as they are not merely narrative of past symptoms or transactions.³ The opinion of a physician or a surgeon upon the cause, nature and effect of wounds or other physical injuries is always admissible.⁴ He may testify to the

the stand as a skilled witness, his obligations to the public now cease, and he stands in the position of any professional man consulted in relation to a subject on which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow them gratuitously on any party; neither the public any more than any private person have a right to extort services from him in the line of his profession without adequate compensation. On the witness stand, precisely as in his office, his opinion may be given or withheld at pleasure; for a skilled witness cannot be compelled to give an opinion, nor be committed for contempt if he refuses to do so."

¹ Louisville, etc. Co. v. Falvey, 104 Ind. 409.

² Enos v. St. Paul Fire & Mar. Ins. Co. (S. D., 1894), 57 N. W. Rep. 919.

³ Johnson v. N. Pac. R. Co., 47 Minn. 430; Kansas City, etc. Co. v. Stoner, 51 Fed. Rep. 649; 2 C. C. A. 437; Barber v. Merriam, 11 Allen (Mass.), 322; Towle v. Blake, 48 N. H. 92; Coyne v. Railroad Co., 62 Hun, 620; Quaife v. Chicago, etc.

Co., 48 Wis. 513; Eckles v. Bates, 26 Ala. 655; State v. Gedicke, 43 N. J. L. 86; Illinois C. R. Co. v. Sutton, 42 Ill. 438. "A physician cannot be permitted to decide on the credibility of witnesses nor to take into consideration facts known to him and not to the jury; but, after having communicated such facts in his testimony, he may take them into consideration in forming his opinion." Louisville, etc. Co. v. Falvey, 104 Ind. 409.

⁴ Fay v. Swan, 44 Mich. 544; Robinson v. Marino, 3 Wash. St. 434; Bowen v. Huntington, 35 W. Va. 682; Atchison, etc. Co. v. Brassfield (Kan., 1893), 32 Pac. Rep. 814; Graves v. Battle Creek (Mich., 1893), 54 N. W. Rep. 757; Reed v. Penn. R. Co., 56 Fed. Rep. 184. But an opinion that on an unusual exposure or a change in the weather some pain may be suffered is inadmissible, as too speculative. Elsas v. Second Ave. R. R. Co., 56 Hun, 161. On the other hand, in Bliss v. New York Cent. & H. R. R. Co. (Mass., 1894), 36 N. E. Rep. 65, it was held that a medical expert might testify not only to the probable but to the "possible" immediate effect of

manner in which in his opinion the injury was inflicted,¹ and where he has stated that it was caused by a certain weapon or implement, he may in a criminal trial be shown an instrument which has been proved to have been in the defendant's hand, and may be asked if it would have caused the wound or injury.² An expert physician may be asked what would be the effect of a certain blow or other injury and whether a person would be likely to recover therefrom,³ the length of time the injured person may live,⁴ and whether death would ensue.⁵ A physician, after having described the symptoms which have been observed by him, may give an opinion as to their probable cause⁶ and as to the nature and curability⁷ of the disease from which the person is suffering.⁸ A physician is a qualified witness upon the probable cause producing

a nervous shock which plaintiff claimed he had received.

¹ Texas Cent. R. Co. v. Burnett (Tex., 1891), 16 S. W. Rep. 320; State v. Ginger, 80 Iowa, 574; Rash v. State, 61 Ala. 89; Doolittle v. State, 93 Ind. 272; Boyle v. State, 61 Wis. 349. Cf. Wabash W. R. Co. v. Friedman, 41 Ill. App. 270; Egler v. People, 56 N. Y. 642; Gas Co. v. O'Brien, 118 Ill. 174; Boyd v. State, 14 Lea (Tenn.), 161; Comin v. Piper, 120 Mass. 188; State v. Clark, 15 S. C. 103; Chicago R. R. v. Lambert, 119 Ill. 255.

² Kennedy v. People, 39 N. Y. 245; People v. Carpenter, 102 id. 238.

³ Ney v. Troy, 3 N. Y. S. 679; Strohm v. Railroad Co., 96 N. Y. 305; Cunningham v. Railroad Co., 49 Fed. Rep. 39; Reed v. Penn. R. Co., 56 Fed. Rep. 184; Denver Tramway Co. v. Reid (Colo., 1894), 35 Pac. Rep. 269; King v. Second Ave. R. R. Co., 26 N. Y. S. 973.

⁴ Alberti v. N. Y., L. E. & N. R. Co., 118 N. Y. 77; Armstrong v. Ackley, 71 Iowa, 76; 32 N. W. Rep. 180; People v. Wilson, 109 N. Y. 345.

⁵ Coyne v. Manhattan Ry. Co., 62 Hun, 620; Reed v. Penn. Ry. Co., 56 Fed. Rep. 184; Davis v. State, 38 Md. 15; State v. Crenshaw, 32 La. Ann. 406; Armstrong v. Ackley, 71 Iowa, 76; Manufac. Acc. Ind. Co. v. Dorgan, 58 Fed. Rep. 94; Griswold v. N. Y. Cent. R. R. Co., 115 N. Y. 61; Johnson v. Broadway R. R. Co., 6 N. Y. S. 112.

⁶ Van Deusen v. Newcomer, 40 Mich. 120; Louisville, etc. Co. v. Falvey, 104 Ind. 409; Robinson v. Marino, 3 Wash. 434; Bowen v. Huntington, 35 W. Va. 682.

⁷ Matteson v. N. Y. etc. R. Co., 35 N. Y. 487. See cases in note 3.

⁸ Jones v. White, 11 Humph. (Tenn.) 268; Flynt v. Bodenhamer, 80 N. C. 205; Polk v. State, 36 Ark. 117; Hook v. Stovell, 26 Ga. 704; Baltimore & Lib. Turn. Co. v. Cassell, 66 Md. 419; Cooper v. State, 23 Tex. 336; Linton v. Hurley, 14 Gray (Mass.), 191; Pidcock v. Potter, 68 Pa. St. 342; Burns v. Barenfeld, 84 Ind. 43.

death,¹ and he may state when, in his opinion, death took place² and by what weapons or instruments it was caused.³

§ 193. Evidence of medical experts to show character of disease and blood-stains — Expert evidence as to autopsies and malpractice.— Medical testimony is generally admissible to show the ordinary duration and character of a disease,⁴ its cause and the proper remedy,⁵ whether it is contagious,⁶ and whether its recurrence is probable.⁷ So a physician may give his opinion that the party is not simulating disease.⁸ The testimony of a physician otherwise competent who conducted an autopsy is not inadmissible because minor statutory details were not observed by him.⁹ He may give his opinion as to what tests were needed to ascertain the cause of death. Where several physicians hold an autopsy, the evidence of any one of them is competent to show a fact observed by any of the others at the autopsy.¹⁰ But an expert witness, it has been held, cannot be permitted to testify merely from hearing the evidence that an autopsy was or was not so conducted that the cause of death could be stated with any degree of certainty.¹¹ So a physician may give his opinion of the sex of a person, based upon an examination which he has made of a skeleton,¹² and he may testify generally as to the cause of

¹ *Boyle v. State*, 61 Wis. 349; *Com. v. Thompson* (Mass., 1893), 33 N. E. Rep. 1111; *Eggle v. People*, 56 N. Y. 64; *People v. Sessions*, 58 Mich. 594.

² *State v. Clark*, 15 S. C. 403.

³ *Waite v. State*, 13 Tex. App. 169; *Banks v. State*, id. 182; *Manufg. Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

⁴ *Finnegan v. Fall Riv. Gas Works* (Mass., 1893), 34 N. E. Rep. 523; *Linton v. Hurley*, 14 Gray (Mass.), 191; *Washington v. Cole*, 6 Ala. 212; *Jones v. White*, 11 Humph. (Tenn.) 268; *Powell v. Railroad Co.*, 77 Ga. 192; *Willey v. Portsmouth*, 35 N. H. 303.

⁵ *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Flynt v. Bodenhamer*, 80

N. C. 205; *Baltimore v. Lib. Turn' Co.*, 66 Md. 419; *Pidcock v. Potter*, 68 Pa. St. 344; *Matteson v. Railroad Co.*, 62 Barb. (N. Y.) 364; *Armstrong v. Ackley*, 71 Iowa, 76; *Cooper v. State*, 23 Tex. 336; *Jones v. Tucker*, 41 N. H. 546.

⁶ *Moore v. State*, 17 Ohio St. 321.

⁷ *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 42.

⁸ *Railroad v. Martin*, 112 Ill. 16. *Contra*, *Cole v. Lake Shore, etc. Co.* (Mich., 1893), 54 N. W. Rep. 638.

⁹ *Com. v. Taylor*, 132 Mass. 261.

¹⁰ *People v. Wilson*, 109 N. Y. 345.

¹¹ *Manufacturers' Acc. Ind. Co. v. Dorgan*, 58 Fed. Rep. 945.

¹² *Wilson v. State*, 41 Tex. 320.

the condition in which a body is found after death¹ or burial.² As all persons are more or less familiar with the appearance of stains caused by human blood, it has been repeatedly held that an ordinary witness may testify that certain stains resemble those made by human and animal blood. No peculiar skill or experience is necessary to be possessed by the witness,³ though if he is an expert physician or microscopist his testimony upon this subject may be more worthy of consideration and belief by the jury.⁴

The opinions of medical experts are admissible in actions to recover damages for malpractice committed by physicians and surgeons to show whether the plaintiff was or was not properly treated.⁵ But such evidence is not received to show the general reputation of the defendant for skill,⁶ or that he procured his diploma by irregular methods,⁷ or to show the

¹ *State v. Pike*, 65 Me. 111; *O'Mara v. Com.*, 75 Pa. St. 424.

² *State v. Secrest*, 80 N. C. 450.

³ *People v. Gonzalez*, 35 N. Y. 49; *Thomas v. State*, 67 Ga. 460; *McLain v. Com.*, 99 Pa. St. 86; *Woolfolk v. State*, 85 Ga. 69; *People v. Greenfield*, 30 N. Y. Sup. Ct. 462; 85 N. Y. 75, 83; *Dillard v. State*, 58 Miss. 368; *People v. Deacons*, 109 N. Y. 374.

⁴ *Com. v. Sturtivant*, 117 Mass. 122; *Knoll v. State*, 55 Wis. 249; *State v. Knight*, 43 Me. 1. Only experts should be allowed to testify whether a certain stain was caused by animal or human blood. *Lindsay v. People*, 6 N. Y. 143. It is affirmed by many microscopists that it is an easy matter to distinguish human blood by the size and shape of the corpuscles. The more recent and perhaps better opinion is that "while a skilful expert can with certainty distinguish between human blood corpuscles and those of the blood of a cow, pig or other domestic animals with which it would be likely to be confounded, still in a

murder trial, where human life is at stake, the expert is hardly warranted to swear that the blood-stain is anything more than that of a mammal." Citing Communication of John J. Reese in *Med. Leg. Jour.*, Sept., 1892. See Reese, *Med. Jurisprudence*, p. 132 (2d ed.), 1889.

⁵ *Spaulding v. Bliss*, 83 Mich. 311; *Boyston v. Giltner*, 3 Ore. 118; *Wright v. Hardy*, 22 Wis. 348; *Quinn v. Higgins*, 63 Wis. 664; *Reber v. Herring*, 115 Pa. St. 599; 8 Atl. Rep. 800; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376; *Kay v. Thomson*, 10 Am. L. Reg. (N. B.) 594; *Bennison v. Walbank*, 38 Minn. 313; *Gates v. Fleischer*, 67 Wis. 504; 30 N. W. Rep. 674; *Williams v. Poppleton*, 3 Ore. 139; *Van Hoover v. Berghoff*, 90 Mo. 487; *Roberts v. Johnson*, 58 N. Y. 613.

⁶ *Stevenson v. Gelsthorpe*, 10 Mont. 503; *Boydston v. Giltner*, *supra*; *Gramm v. Boener*, 56 Ind. 497; *Leighton v. Sargent*, 11 Fost. (N. H.) 120.

⁷ *Bute v. Potts*, 18 Pac. Rep. 329; 76 Cal. 304.

professional standing of the medical college at which he studied.¹ The witness may be asked if the death of the patient could be attributed to the unskilfulness or negligence of the defendant,² and he may give his opinion upon the properties and effect of the medicine or other means employed,³ or may state the customary and proper practice in similar cases.⁴

§ 194. Non-expert evidence upon a person's physical condition.—A witness who, though he is not an expert, has had adequate opportunities for observation, may testify to all facts within his knowledge concerning the physical condition of a person, where such facts do not presuppose the possession of any special scientific or medical experience or training on his part;⁵ as, for example, to the fact that a person's leg was broken,⁶ or that he was unconscious on a certain date.⁷ So the evidence of a non-expert witness is admissible, though it may consist merely of an opinion, that a person seemed to be in good health or suffering from illness,⁸ as to the extent of the illness,⁹ or that a person who had been ill had grown better or worse.¹⁰ But where a witness has testified that a

¹ Leighton v. Sargent, 11 Fost. (N. Fed. Rep. 75; People v. Millard, 53 Mich.) 120.

² Wright v. Hardy, 22 Wis. 348.

⁶ Montgomery v. Scott, 34 Wis. 338.

³ Barber v. Merriam, 11 Allen, 322; Mertz v. Detweiler, 8 W. & S. (Pa.) 376.

⁷ Chicago City R. R. Co. v. Van Vleck (Ill., 1893), 32 N. E. Rep. 262; Pennsylvania Co. v. Newmeyer, 129 Ind. 401; 28 N. E. Rep. 860.

⁴ Twombly v. Leach, 11 Cush. (Mass.) 405; Doyle v. Eye & Ear Infirmary, 80 N. Y. 601. Cf. Link v. Sheldon, 18 N. Y. S. 815; Gates v. Fleischer, 67 Wis. 504; 30 N. W. Rep. 674.

⁸ Chicago City Ry. Co. v. Van Vleck (Ill., 1893), 32 N. E. Rep. 462; Lawson v. Conaway, 37 W. Va. 159; Doyle v. Manhattan Ry. Co., 59 Hun, 625; Baltimore & O. R. R. Co. v. Rambo, 59 Fed. Rep. 75; Hardy v. Merrill, 56 N. H. 227; United Breth. M. A. I. Co. v. O'Hara, 120 Pa. St. 256; Wilkinson v. Moseley, 30 Ala. 562; Barker v. Coleman, 35 Ala. 221; Evans v. People, 12 Mich. 27; Elliott v. Van Buren, 33 Mich. 49.

⁵ Fox v. Penin. W. L. & Color Works, 92 Mich. 243; Rawls v. Am. Mut. L. Ins. Co., 27 N. Y. 282; Rash v. State, 61 Ala. 89; Smalley v. Appleton, 70 Wis. 349; 25 N. W. Rep. 729; Navarro v. State, 24 Tex. App. 578; Com. v. Sturtivant, 117 Mass. 122; B. & O. Turn. Co. v. Cassell, 66 Md. 419; Higbie v. Guardian L. I. Co., 52 N. Y. 603; Tierney v. Railroad Co., 24 Am. L. Reg. 669; Baltimore & O. R. Co. v. Rambo, 59

⁹ Heddles v. Chicago & N. W. R. Co., 46 N. W. Rep. 115; 71 Wis. 288.
¹⁰ Louisville, etc. Co. v. Wood, 12 N. E. Rep. 572; King v. Second Ave.

person never had any trouble with his hearing, he will not be permitted to give an opinion that the person's sight and hearing are ordinary in character.¹

Where the symptoms of a disease are such that they are perceptible and recognizable by a person of ordinary knowledge, a non-expert witness may testify, after stating the facts, that certain symptoms manifested themselves.² But no witness except an expert should be permitted to give an opinion (except perhaps where the symptoms are indicative of a disease to the most casual inspection)³ as to the specific medical character of a disease or injury from which a person is suffering.⁴

§ 195. Chemists as experts — Poisons.— Chemists and toxicologists are frequently called as expert witnesses. Thus, a chemist who is properly qualified may testify to the result of an analysis of the contents of the stomach or other bodily organs, made to ascertain the presence of poison.⁵ But a physician, though he may give an opinion that death resulted from the administration of a certain poison,⁶ or may describe the symptoms which are present when poison has been given,⁷

R. Co., 26 N. Y. S. 973. A non-expert witness may give his opinion upon the nature of an injury where he has adequate knowledge of the circumstances. *Goshen v. England*, 21 N. E. Rep. 977; 119 Ind. 363.

¹ *Barrelle v. Penn. Ry. Co.*, 4 N. Y. S. 127. "Any witness of ordinary intelligence may be able to state that a sick or wounded person has grown worse, or has improved, without being able to give an accurate description of his condition. Undoubtedly the facts on which the conclusion rests may be asked for on cross-examination; but the opinion is not incompetent merely because the witness cannot state the ground on which it rests, although the failure to do so may, perhaps, weaken its probative force." *Louisville, etc. R. Co. v. Wood*, 12 N. E. Rep. 572.

² See cases cited *supra*.

³ *Duntzy v. Van Buren*, 5 Hun, 648; *Owens v. Kansas City*, 95 Mo. 169.

⁴ Where the defendant is sued to recover the value of a bust which he refuses to accept, claiming that it is not a good likeness, a witness who has for many years been well acquainted with the person whose bust is in dispute may testify upon the question of resemblance or likeness. *Schwartz v. Wood*, 21 N. Y. S. 1053; 67 Hun, 638.

⁵ *State v. Bowman*, 78 N. C. 509; *Hass v. Marshall* (Pa., 1888), 14 Atl. Rep. 421; *State v. Cook*, 17 Kan. 394; *State v. Slagle*, 83 N. C. 630; *State v. Hinkle*, 6 Iowa, 380; *Joe v. State*, 6 Fla. 591.

⁶ *Mitchell v. State*, 58 Ala. 418.

⁷ *State v. Terrell*, 12 Rich. (S. C.) 321; *Polk v. State*, 36 Ark. 117; *People v. Robinson*, 2 Park. Cr. Cas. 236.

will not be permitted to state the result of a chemical analysis, unless it is shown that he is experienced in chemical research.¹ So the identity of the subject analyzed with that involved in the case, and the fact that it has not been tampered with, must be shown.² The expert testimony of a chemist is admissible upon the effect of poisons³ and noxious gases,⁴ to show that one man can safely inhale more gas than another;⁵ that certain particular gases are the result of a certain process;⁶ as to the ingredients and nature of writing or other inks;⁷ to the safety of oil lamps,⁸ or to the quality of milk.⁹

§ 196. **Expert evidence where sexual crimes have been committed — Abortion.**— A physician may testify, after an examination of the person, that there has been actual penetration in a prosecution for rape,¹⁰ and may give an opinion upon the question whether sexual intercourse was possible,¹¹ and whether pregnancy would be likely to ensue where a rape was committed.¹² So expert testimony is admissible to show the physical strength and condition of the prosecuting witness in a prosecution for rape where her ability to resist

¹ *State v. Cook*, 17 Kan. 394. *Contra*, *Siebert v. People*, 32 N. E. Rep. 431.

² *State v. Cook*, 17 Kan. 394; *State v. Hinkle*, 6 Iowa, 380.

³ *Fox v. Penin. W. L. Co.*, 92 Mich. 243.

⁴ *Lincoln v. Taunton Co.*, 9 Allen (Mass.), 122.

⁵ *Birmingham F. & N. Co. v. Gross* (Ark., 1893), 12 S. Rep. 36.

⁶ *Citizens' G. L. Co. v. O'Brien*, 118 Ill. 174; *Turner v. Black Warrior*, 1 McCall, 181. *Cf.* *Emerson v. Lowell G. L. Co.*, 6 Allen (Mass.), 146.

⁷ *Sheldon v. Warner*, 45 Mich. 638; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *In re Monroe's Estate*, 23 Abb. N. C. 83; 5 N. Y. S. 552; *People v. Brotherton*, 47 Cal. 388; *Ellingwood v. Brogg*, 52 N. H. 448; *Clark v. Bruce*, 12 Hun, 271; *Allen v. Hunter*, 6 McLean, 303.

⁸ *Bierce v. Stocking*, 11 Gray, 174.

⁹ *Com. v. Holt*, 146 Mass. 38. A witness to be qualified to testify to the nature and quality of food or drink need not always be a professional chemist or analyst. If the witness possess adequate knowledge of the articles in question, his testimony is not incompetent because he has not submitted them to a chemical analysis. So a farmer or dairyman may testify whether milk was diluted and whether it tasted like milk and water. *Lane v. Wilcox*, 55 Barb. (N. Y.) 615. And an habitual drinker of beer may be allowed to state that a certain liquor was lager beer. *Com. v. Moinehan*, 140 Mass. 463; 1 N. E. Rep. 59.

¹⁰ *State v. Smith*, 4 Phill. (N. C.) 302; *Woodin v. People*, 1 Park. C. C. (N. Y.) 464. *Cf.* *Com. v. Lynes*, 142 Mass. 577.

¹¹ *People v. Clark*, 33 Mich. 112.

¹² *Young v. Johnson*, 123 N. Y. 226.

the prisoner is in issue.¹ A physician may testify to the time required to commit an abortion;² that an abortion has been performed,³ and that certain drugs⁴ or instruments⁵ which have been found in the possession of the accused were adapted to produce an abortion. So a physician may be asked if, under certain circumstances, any traces of an abortion would remain after one had been committed or attempted.⁶

§ 197. **Expert evidence upon insanity.**—According to the weight of authority, a non-expert witness who has had adequate means of becoming acquainted with the mental state of a person whose sanity is in issue may give his opinion upon the sanity or insanity of the individual.⁷ In doing so, however, he will be required to state all the facts and circumstances within his knowledge bearing on the question and on which his opinion is based.⁸ The opinion of a non-

¹ *State v. Knapp*, 45 N. H. 148.

² *People v. McGonegal*, 136 N. Y. 62.

³ *Com. v. Thompson* (Mass., 1893), 33 N. E. Rep. 1111; *State v. Smith*, 32 Mo. 370; *State v. Wood*, 53 N. H. 484; *Com. v. Brown*, 14 Gray (Mass.), 411.

⁴ *Regina v. Still*, 30 U. C. C. P. 30; *Williams v. State* (Tex., 1892), 19 S. W. Rep. 897.

⁵ *Com. v. Brown*, 121 Mass. 69; *People v. Vedder*, 98 N. Y. 630.

⁶ *Bathrick v. Detroit, etc. Co.*, 50 Mich. 629.

⁷ *Mull v. Carr* (Ind., 1893), 32 N. E. Rep. 591; *State v. Maier*, 36 W. Va. 757; *Armstrong v. State*, 30 Fla. 170; *State v. Lehman* (S. D., 1891), 49 N. W. Rep. 31; *Conn. M. L. Ins. Co. v. Lathrop*, 111 U. S. 612; *Cram v. Cram*, 33 Vt. 15; *Wheelock v. Godfrey* (Cal., 1894), 35 Pac. Rep. 317; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232; *Powell v. State*, 25 Ala. 28; *Norton v. Moore*, 3 Head (Tenn.), 482; *McClackey v. State*, 5 Tex. App. 320; *Wood v. State*, 58 Miss. 741; *Hardy v. Merrill*, 56 N. Y.

227; *State v. Klinger*, 46 Mo. 229; *Rutherford v. Morris*, 77 Ill. 397; *People v. Levy*, 71 Cal. 618; *Butler v. Insurance Co.*, 45 Iowa, 93; *Brooke v. Townsend*, 7 Gill (Md.), 10; *People v. Wreden*, 59 Cal. 392; *State v. Hayden*, 51 Vt. 296; *Clary v. Clary*, 2 Ired. (N. C.) 78; *State v. Erb*, 74 Mo. 199; *Woodcock v. Woodcock*, 36 Minn. 217; *Pidcock v. Potter*, 68 Pa. St. 342; *Clark v. State*, 13 Ohio St. 483; *Pinney's Will*, 27 Minn. 280; *People v. Pakenham*, 115 N. Y. 200; *Schlencker v. State*, 9 Neb. 241.

⁸ *Armstrong v. State*, 30 Fla. 170; *Ellis v. State* (Tex., 1894), 24 S. W. Rep. 894; *White v. Davis*, 17 N. Y. S. 548; 62 Hun, 622; *Sharp v. Kansas, etc. Co.* (Mo., 1892), 20 S. W. Rep. 93; *Carpenter v. Bailey*, 29 Pac. Rep. 101; 94 Cal. 406. But some courts will not receive non-expert evidence as to insanity except to describe the acts or conversations of the alleged insane person, though the witness may further give his opinion that such acts and conversations are those of a rational or irrational man. *Paine v. Aldrich*, 133

professional witness as to insanity upon facts related to him by others is not admissible. But where he has knowledge of the circumstances, where he has seen the actions of the person and conversed with him, the law considers it a matter easily within the mental capacity of any ordinary man to distinguish and characterize the mental condition or the appearance and conduct of an insane person. The influence which his opinions may have upon the jury will depend on the intelligence he shows on his examination and upon his opportunities for acquiring the knowledge upon which he bases his conclusion. So his experience and personal acquaintance with the alleged lunatic, his freedom from bias or interest, the absence of any finely-spun theories from his mental conception of the whole matter, the fullness of the facts on which his opinion is based, and the accuracy with which he recollects these facts, are all elements to be regarded in estimating the worth of his evidence.¹ The person whose insanity is involved may have been so deranged, his mental unsoundness may have been so palpably apparent from his actions, that an ordinary person possessing but slight powers of observation may be as well fitted to express an opinion as the most skilful and learned expert. Here the insanity is a fact, and the testimony of the witness, though in form an expression of opinion, yet if when giving it he narrates the minor facts from which it is deduced, and after showing that he has personally known the party for a long time, he details the furious acts and gestures, the foolish and incoherent conversations, or the wild and unnatural conduct of the party, there can be small objection to his testifying to the further fact which any man would infer from them, *i. e.*, that the party was insane.² But as to

N. Y. 544; 30 N. E. Rep. 725; Fayette v. Chesterville, 77 Me. 28; Hickman v. State, 38 Tex. 191; State v. Geddis, 42 Iowa, 268.

¹ Cf. Armstrong v. State, 30 Fla. 170; McLeod v. State, 31 Tex. Crim. Rep. 331.

² The opinion of a non-professional witness as to the mental condition of a person, in connection with a statement of the facts and circum-

stances within his personal knowledge upon which that opinion is formed, is competent evidence. In a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual as sane or insane is a fact, and the expressed opinion of one who had adequate opportunities to observe his conduct and appearance is but the statement of a fact. Insanity is a

the amount of knowledge which the witness must have, no definite rule can be laid down. While the opinion of a witness who has a full knowledge of the life and surroundings of the person would naturally possess more weight than that of one who had only a meager knowledge, the question what weight the opinion shall have is for the jury alone.¹ Whether the non-expert witness is competent is for the court; and if it shall appear that a witness did not have sufficient opportunities for observation, his evidence should be pronounced incompetent. The court's decision on this point, it seems, will not be questioned on appeal;² nor is it error to charge that the evidence of a physician who has examined the party may be given more weight than that of a non-expert witness.³

Where the insanity of a person is a question in issue, the opinions of competent physicians or of expert alienists are always admissible. They may have obtained their opinions from the consideration of facts observed by them in treating or examining the party, or they may base them upon the facts contained in a hypothetical question, or upon all the evidence in the case, if they have heard it and if it is not contradictory.⁴ If a personal examination has been made by the

condition which impresses itself as an aggregate on the observer." *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 618-620.

¹ *Com. v. Buccieri*, 153 Pa. St. 535; 26 Atl. Rep. 228; *McLeod v. State*, 31 Tex. Crim. Rep. 331; *Armstrong v. State*, 30 Fla. 170; 11 S. Rep. 618; *Coles v. State*, 75 Ind. 511; *Sage v. State*, 91 Ind. 141; *Choice v. State*, 31 Ga. 424; *McClackey v. State*, 5 Tex. App. 320.

² *Hite v. Com.* (Ky., 1893), 20 S. W. Rep. 217; *Carpenter v. Hatch* (N. H., 1888), 15 Atl. Rep. 219.

³ *Blake v. Rourke*, 74 Iowa, 519; 38 N. W. Rep. 392.

⁴ *Prentiss v. Bates*, 53 N. W. Rep. 153; 93 Mich. 234; *Com. v. Buccieri*, 153 Pa. St. 535; 26 Atl. Rep. 228; *Quaife v. Chicago Co.*, 48 Wis. 513; *Goodwin v. State*, 96 Ind. 550; *Board-*

man v. Woodman, 47 N. H. 120; *State v. Feltes*, 51 Iowa, 495; *Fairchild v. Bascomb*, 35 Vt. 398; *People v. Barber*, 115 N. Y. 475; *Rambler v. Tryson*, 7 S. & R. 90; *State v. Baber*, 74 Mo. 292; *Grant v. Thompson*, 4 Conn. 203; *Dejarnetto v. Com.*, 75 Va. 867; *Conn. L. I. Co. v. Lathrop*, 111 U. S. 612; *United States v. Guiteau*, 3 Crim. L. Mag. 347; *People v. Schuyler*, 106 N. Y. 298; *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Tules v. Kidd*, 12 Ala. 648. "The witness who claims to be an expert on insanity must have made mental unsoundness a subject of special study, and must have such a practical experience in the care and treatment of insane persons as to render him conversant with the subject and able to recognize its peculiar subtle manifestations." *Reese, Med. Juris.*

expert, he will be required to describe the circumstances and symptoms which he observed to aid the jury in forming a conclusion;¹ but not what the attendants said;² and besides this, a hypothetical question may be asked him.³ The opinions of the subscribing witnesses to a will are always admissible concerning the mental condition of the testator at the date of executing the will, the law having placed them at his side partly for that purpose, and it is immaterial whether they are expert or non-expert witnesses, or whether they were previously acquainted with the testator or not.⁴

§ 198. **Mechanical experts.**—Opinion evidence is always admissible upon matters of trade or transportation where the subject of inquiry is one out of the cognizance of all those not engaged in that particular calling.⁵ Thus, a person who has been connected for a long time with the operation of railroads may testify as to the speed of trains,⁶ how they are made up and the duty of conductors;⁷ within what distance a train may be stopped;⁸ or he may state his opinion why it was derailed,⁹ or as to the proper manner of stopping a train;¹⁰ or whether brakemen were properly placed.¹¹ So a railroad builder is a qualified witness to give an opinion upon the quality of rolling-stock;¹² whether a railroad is properly

(1891), p. 19. An exception to this rule is made in the case of the family physician of the alleged lunatic. *Hastings v. Rider*, 99 Mass. 625.

¹ *White v. Barley*, 10 Mich. 155; *Puyar v. Reese*, 46 Tenn. 21.

² *Heald v. Thwing*, 45 Me. 396.

³ *People v. Lake*, 12 N. Y. 358; *Meeker v. Meeker* (Iowa, 1888), 37 N. W. Rep. 773.

⁴ *Ekinton v. Brick*, 44 N. J. Eq. 154; 15 Atl. Rep. 391; *Van Huss v. Rainbolt*, 42 Tenn. 139; *Hardy v. Merrill*, 56 N. H. 227; *Poole v. Richardson*, 3 Mass. 330; *Deartt v. Barley*, 9 N. Y. 371; *Williams v. Lee*, 47 Mo. 321; *Potts v. House*, 6 Ga. 324; *Grant v. Thompson*, 4 Conn. 203; *Robinson v. Adams*, 62 Me. 369.

⁵ *Ft. Worth, etc. Co. v. Great-house*, 82 Tex. 104.

⁶ *Grand R. etc. Co. v. Huntley*, 38 Mich. 537.

⁷ *Price v. Richmond & D. R. Co.* (S. C., 1893), 17 S. E. Rep. 733.

⁸ *Grimmell v. Chicago, etc. Co.*, 73 Iowa, 93; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; 12 N. E. Rep. 372.

⁹ *Fort Worth Ry. Co. v. Thompson*, 75 Tex. 501; *Seaver v. Boston, etc. Co.*, 14 Gray (Mass.), 466.

¹⁰ *Mobile, etc. Co. v. Blakely*, 59 Ala. 471. *Cf. O'Neill v. Railway Co.*, 129 N. Y. 125.

¹¹ *Schlaf v. Railroad Co.* (Ala., 1893), 14 S. Rep. 105; *Cincinnati, etc. Co. v. Smith*, 22 Ohio St. 227; *Reifsnyder v. Chic. Meter Co.* (Iowa, 1894), 57 N. W. Rep. 692.

¹² *Jeffersonville, etc. Co. v. Lanham*, 27 Ind. 171.

built;¹ whether a section of road was finished upon a certain date,² or whether a culvert was in good repair.³ But generally a witness is not considered an expert, though possessing a general knowledge of the management of railroads, unless he has a special knowledge of that branch to which he is called to speak.⁴ A nautical expert may give an opinion that a ship was properly managed⁵ or the cargo properly stowed;⁶ that a vessel was seaworthy;⁷ as to the cause of a ship being stranded;⁸ what is a safe cargo for a ship;⁹ as to the soundness of a cable,¹⁰ the cause of a leak,¹¹ and as to the size of waves which would be caused by the wind.¹² So when the issue is whether a collision could have been avoided,¹³ or a ship could have reached port if properly managed,¹⁴ what the effect of a storm would be on the management of the vessel;¹⁵ whether a jettison was necessary,¹⁶ or whether a deck-load would render a vessel unsafe,¹⁷ the evidence of an expert is admissible.¹⁸

¹ Colorado Mid. Ry. v. O'Brien, 16 Colo. 219.

² Louisville, etc. Co. v. Donegan, 111 Ind. 179.

³ Bonner v. Mayfield, 82 Tex. 234.

⁴ McKelvey v. Railway Co., 39 W. Va. 500; Pennsylvania Co. v. Conlan, 101 Ill. 93; Bixby v. Montpelier, etc. Co., 49 Vt. 125; Ballard v. N. Y., L. E. etc. Co., 126 Pa. St. 141; Hill v. Portland, etc. Co., 55 Me. 438; Baldwin v. Chicago, etc. Co., 50 Iowa, 680; Ft. Worth, etc. Co. v. Thompson, 21 S. W. Rep. 737; Ft. Worth & D. C. Ry. Co. v. Wilson, 24 S. W. Rep. 686; 3 Tex. Civ. App. 583.

⁵ Gusterman v. Liverpool Ins. Co., 83 N. Y. 358; Union Ins. Co. v. Smith, 8 S. Ct. 534; Delaware, etc. Co. v. Starrs, 69 Pa. St. 36; Eastern Trans. Co. v. Hope, 95 U. S. 297.

⁶ Price v. Powell, 3 N. Y. 322; Leitch v. At. Mut. Ins. Co., 66 N. Y. 100.

⁷ Baird v. Daily, 68 N. Y. 547; Western Ins. Co. v. Tobin, 32 Ohio

St. 277; Perkins v. Augusta Ins. Co., 10 Gray, 312.

⁸ N. E. Glass Co. v. Lovell, 7 Cush. 319.

⁹ Ogden v. Parsons, 23 How. (U. S.) 167.

¹⁰ Reed v. Dick, 8 Watts (Pa.), 479.

¹¹ Paddock v. Con. Ins. Co., 104 Mass. 521; Parsons v. Man. etc. Co., 16 Gray (Mass.), 463.

¹² Smith v. Railroad Co., 76 Tex. 63.

¹³ Jameson v. Drinkard, 12 Moore, 148; Fenwick v. Bell, 1 C. & K. 312; Carpenter v. Eastern Trans. Co., 71 N. Y. 374; 67 Barb. 570.

¹⁴ The Alaska, 33 Fed. Rep. 107; Dolz v. Morris, 17 N. Y. Sup. Ct. 202.

¹⁵ Transp. Line v. Hope, 95 U. S. 297; Walsh v. Washington, etc. Co., 32 N. Y. 427.

¹⁶ Price v. Hartson, 44 N. Y. 94.

¹⁷ Lapham v. Atlas Ins. Co., 24 Pick. (Mass.) 1. *Contra*, Schurreger v. Raymond, 105 N. Y. 648.

¹⁸ *Cf.* East Tennessee, etc. Co. v. Wright, 76 Ga. 532.

Persons who have had experience in operating certain machinery, even though not machinists by trade,¹ may give their opinion as to the value² of similar machinery, or that machinery in suit is not well constructed,³ or is the best known,⁴ or is equal to the best,⁵ or has a capacity for doing certain work.⁶ A witness who, from long experience in using a certain machine, is qualified to speak as an expert, may testify to the capacity of an identical machine, though he may never have seen the machine in dispute.⁷ An experienced mason or builder may testify to the time required for the walls of a house to dry in order to render it habitable;⁸ as to the cause of the dampness of walls;⁹ whether the defective operation of a mill was the result of mismanagement or faulty construction;¹⁰ as to the proper mode of removing paint from the walls of buildings;¹¹ whether a building is a "good job;"¹² as to the meaning of the term "brick building;"¹³ whether a house is worth the amount alleged,¹⁴ and the time required to alter or repair it.¹⁵ So a skilled architect may testify to the strength, construction and sufficiency of a building,¹⁶ and whether it would be safe to run up a building in a specified time.¹⁷ When, however, the facts are such that

¹ *Sheldon v. Booth*, 50 Iowa, 209; *Cole v. Clark*, 3 Wis. 323. Cf. *Fox v. Peninsula W. L. Co.* (Minn., 1892), 52 N. W. Rep. 623.

² *Latham v. Shipley* (Iowa, 1893), 53 N. W. Rep. 342.

³ *Sheldon v. Booth*, 50 Iowa, 209; *Curtis v. Gano*, 26 N. Y. 426.

⁴ *Great W. R. R. Co. v. Haworth*, 39 Ill. 349.

⁵ *Scattergood v. Wood*, 79 N. Y. 263.

⁶ *Burns v. Welch*, 8 Yerg. (Tenn.) 117; *Bemis v. Vermont R. R. Co.*, 58 Vt. 636.

⁷ *Brierly v. Davol Mills*, 128 Mass. 291; *National Bank v. Dunn*, 106 Ind. 110.

⁸ *Smith v. Gugerty*, 4 Barb. 619.

⁹ *Lotz v. Scott*, 103 Ind. 155.

¹⁰ *Chandler v. Thompson*, 30 Fed. Rep. 33. Where the proper method

of burning tiles is in issue, a brick or tile maker is a competent expert. *Wiggins v. Wallace*, 19 Barb. 338.

¹¹ *Church of Holyoke v. Mut. Fire Ins. Co.* (Mass., 1893), 33 N. E. Rep. 572.

¹² *Ward v. Kilpatrick*, 85 N. Y. 413.

¹³ *Mead v. N. W. Ins. Co.*, 3 Selden (7 N. Y.), 530.

¹⁴ *Tebbetts v. Haskins*, 16 Me. 233; *Woodruff v. Imperial F. I. Co.*, 83 N. Y. 113.

¹⁵ *Terre Haute v. Hudnut*, 18 Am. & Eng. Corp. Cas. 302; *Lewis v. Insurance Co.*, 45 N. W. Rep. 749; *Campbell v. Russell*, 139 Mass. 278.

¹⁶ *Prendible v. Conn. R. R. Co.* (Mass., 1893), 35 N. E. Rep. 675; *Turner v. Hahr* (Mo., 1893), 21 S. W. Rep. 737.

¹⁷ *Chamberlain v. Dunlap*, 8 N. Y. S. 125.

ordinary persons are fully capable of forming an opinion thereon, and there is at the same time direct evidence of facts and circumstances from which, if they believe them to be true, the jury may infer negligence in the construction of buildings, expert evidence should be dispensed with as unnecessary.¹ The opinion of a surveyor is admissible to identify monuments employed as boundaries,² or to estimate how much land would be flooded on a certain date.³ The testimony of an expert is admissible to show that a defect exists in a sewer⁴ or highway; that a road is in a dangerous condition;⁵ but not that an old road has been abandoned,⁶ or that a new road would be of use to the public.⁷ So, too, a miner of long experience may give his opinion whether the width of a cross-section in a mine is sufficient to secure the safety of those employed therein.⁸

§ 199. **Expert evidence as to value.**—An expert may testify as to the value of labor or services,⁹ merchandise,¹⁰ ani-

¹Turner v. Hahr (Mo., 1893), 21 S. W. Rep. 737; Gerbig v. Railroad Co., 22 N. Y. S. 21; Davis v. New York, L. E. & W. R. R. Co., 69 Hun, 174.

²McGaun v. Hamilton, 58 Conn. 69; Knox v. Clark, 123 Mass. 216.

³Phillips v. Terry, 3 Abb. Dec. (N. Y.) 607. Cf. Brantley v. Swift, 24 Ala. 390; St. Louis, etc. Co. v. Bradley, 54 Fed. Rep. 630; Schultz v. Lindell, 30 Mo. 310; Randolph v. Adams, 2 W. Va. 519; Pasachane Water Co. v. Standart (Cal., 1893), 32 Pac. Rep. 532.

⁴Stead v. Worcester, 150 Mass. 241.

⁵Harris v. Clinton, 31 N. W. Rep. 425; Stillwater Co. v. Coover, 26 Ohio St. 520; Laughlin v. Street R. R. Co., 62 Mich. 220; Baltimore, etc.

Co. v. Cassell, 66 Md. 419; Fairbury v. Rogers, 98 Ill. 554. *Contra*, Conrad v. Ithaca, 16 N. Y. 158; Yean v. Williams, 15 R. I. 20; Crane v. Northfield, 33 Vt. 126; Montgomery v. Scott, 34 Wis. 345.

⁶Pittsburgh, etc. Co. v. Reich, 101 Ill. 157.

⁷Thompson v. Deprez, 96 Ind. 67.

⁸McNamara v. Logan (Ala., 1894), 14 S. Rep. 175.

⁹Brown v. Prude (Ala., 1893), 11 S. Rep. 833; Head v. Hargrave, 105 U. S. 45; Mercer v. Vose, 67 N. Y. 56; Carruthers v. Town, 53 N. W. Rep. 240; Reynolds v. Robinson, 64 N. Y. 589. The witness must know the usual rate of compensation for such services at the time and place

¹⁰Wheton v. Snider, 88 N. Y. 299; Printz v. People, 42 Mich. 144; State v. Finch, 70 Iowa, 316; Berney v. Dinsmore, 141 Mass. 42; Walker v. Bernstein, 43 Ill. App. 563; McGowan v. Amer. Press. Tan Bark, 121 U. S. 575; Muckle v. Rendle, 16 N. Y. S. 208; Walker v. Collins, 50

Fed. Rep. 737; Allen v. Carpenter, 66 Tex. 138; Latham v. Brown, 48 Kan. 190; Redding v. Wright (Minn., 1892), 51 N. W. Rep. 1056; Huber v. Beck (Ind., 1893), 33 N. E. Rep. 985; Blagen v. Thompson (Oreg., 1893), 31 Pac. Rep. 647.

mals¹ or land,² where he has peculiar experience or information and where the subject of inquiry is not within common knowledge.³ But while weight should be given to his evidence, his opinion is only conclusive on the jury as far as it is reasonable and consistent with general knowledge and with the facts which are proved in the case.⁴ The question of damages is for the jury. Hence the opinion of a witness is not receivable upon this point;⁵ nor can an expert be asked

where the services were rendered. *Schuble v. Cunningham*, 14 Daly, 404; *Alt v. California Fig Syrup Co.*, 19 Nev. 118; *Stevens v. Minneapolis* (Minn., 1889), 43 N. W. Rep. 842 (services of attorney); *Kelly v. Rowane*, 33 Mo. App. 440; *Lamoure v. Caryl*, 4 Den. 170. The expert who testifies to the value of personal services should possess some practical knowledge or experience in the line of the services rendered, either by having rendered such services himself or by having had frequent occasion to pay for them. *Doster v. Brown*, 25 Ga. 24; *Walker v. Fields*, 28 id. 237; *Scott v. Lilienthal*, 9 Bosw. 224; *Tebbetts v. Haskins*, 16 Me. 283. If he has a competent knowledge of the business in which the services were rendered, it is not necessary that he should have been himself engaged in it. *Pullman v. Corning*, 14 Barb. 174; 9 N. Y. 93; *Carroll v. Welch*, 26 Tex. 147; *Barnes v. Ingalls*, 39 Ala. 193. So a physician may testify to the value of a nurse's services. *Woodward v. Bugsbee*, 2 Hun, 128.

¹ *Bowers v. Hogan*, 93 Mich. 420; *Conkling v. Hannibal, etc. Co.*, 54 Mo. 385; *Harris v. Railroad Co.*, 36 N. Y. Sup. Ct. 373.

² *Blass v. Copley*, 10 N. Y. 93; *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Phenix Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. 1; *Maughan v. Burns*, 26 Atl. Rep. 583. An ordinary real-

estate agent is not competent as an expert upon land values (*Laing v. United, etc. Co.*, 54 N. J. L. 576), unless he has resided in the place for some time and has had charge of property near the land in question. *Ragan v. Kansas City & S. E. R. Co.*, 111 Mo. 456. As to rental value, see *Ives v. Quinn*, 27 N. Y. S. 251.

³ A farmer may testify as to the value of crops. *Chicago R. Co. v. Mouriquand*, 45 Kan. 170.

⁴ *Bramble v. Hunt*, 68 Hun, 204; *Head v. Hargrave*, 105 U. S. 45. In regard to the value of household furniture, wearing apparel, etc., any person may testify, as all persons are presumed to know the value of articles in common use. *Parmelee v. Raymond*, 43 Ill. App. 609; *Erickson v. Draskowski*, 94 Mich. 551. Cf. *Rodemacher v. Greenwich Ins. Co.*, *infra*; *Murdock v. Summer*, 22 Pick. 158; *Randall v. Packard*, 20 N. Y. S. 716; *Bentley v. Brown*, 37 Kan. 14.

⁵ *Gulf, C. & S. F. Ry. Co. v. Wright*, 1 Tex. Civ. App. 102; *Logansport v. McMillen*, 49 Ind. 495; *Vandeusen v. Young*, 26 N. Y. 9; *McReynolds v. Railroad Co.*, 106 Ill. 152; *Trammell v. Ramage*, 11 S. Rep. 916; *Crohen v. Ewers*, 39 Ill. App. 34; *Galveston, H. & S. A. Co. v. Wesch* (Tex., 1893), 22 S. W. Rep. 957; *Sharon v. Morris*, 18 Pac. Rep. 230; 39 Kan. 377; *Upcher v. Oberlender*, 31 Pac. Rep. 1080; 50 Kan.

what would be the future value of property¹ or the effect of an injury to it.² A housekeeper of experience is a competent expert witness to the value of board and lodging³ or household furniture or goods;⁴ and one who, though not a dealer, has attended many sales of second-hand furniture, may give an opinion as to the value of such merchandise.⁵ But a person is not an expert who has no knowledge of the market value of goods,⁶ or who has acquired his knowledge by buying goods from parties not in the trade.⁷ The fact that the witness bases his opinion of value upon an exceptional demand for the merchandise in question, while it may affect the weight, is no objection to the admissibility of his evidence.⁸

Based upon the grounds of the speculative character of any opinion which may be given in regard to their value, another exception is made in cases where the value of choses in action is concerned. A witness will not be allowed to give an opinion as to the value of a contract or the possible or probable amount of profit it might have yielded if it had not been broken.⁹ So in the case of negotiable instruments which are presumed to be worth their face value,¹⁰ opinions are not admissible as to their value, the proper elements of which, *i. e.*, the solvency of the parties and the validity of the instruments, are for the consideration of the court and jury.¹¹ It seems,

315; Chicago, K. & W. R. Co. v. Stewart, 31 Pac. Rep. 668; 50 Kan. 33; New Mexican R. R. Co. v. Hendricks (N. Mex., 1893), 30 Pac. Rep. 901; Sixth Ave. R. Co. v. Metropolitan R. Co., 34 N. E. Rep. 400; 138 N. Y. 548; Blum v. Manhattan Ry. Co., 1 Misc. Rep. 119; 20 N. Y. S. 722.

¹ Devlin v. New York, 4 Misc. Rep. 106; 23 N. Y. S. 888; Bookman v. New York El. R. Co., 137 N. Y. 595; Lazarus v. Metropolitan El. Ry. Co., 69 Hun, 190; Little v. Lischkoff (Ala., 1893), 12 S. Rep. 429; Trammell v. Ramage (Ala., 1893), 11 S. Rep. 916.

² Ferguson v. Hubbell, 97 N. Y. 507; Bedell v. L. I. R. R. Co., 44 N. Y. 367; Paige v. Kelly, 5 Hill,

603; Allen v. Stout, 51 N. Y. 668; Ranch v. N. Y., L. & W. R. R. Co., 2 N. Y. S. 108.

³ Hook v. Kenyon, 55 Hun, 598.

⁴ Rodemacher v. Green. Ins. Co., 27 N. Y. S. 155.

⁵ Phillips v. McNab, 9 N. Y. S. 526.

⁶ Frederick v. Case, 28 Ill. App. 215.

⁷ Campbell v. Campbell, 54 N. Y. Super. Ct. 381.

⁸ Western Ry. v. Lazarus, 88 Ala. 453.

⁹ Devlin v. City of New York, 4 Misc. Rep. 106.

¹⁰ Loomis v. Mowry, 8 Hun, 311.

¹¹ Potter v. Merchants' Bank, 28 N. Y. 641; Atkinson v. Roch Printing Co., 43 Hun, 167.

however, that expert evidence may be received of the value of non-speculative financial securities having a well-recognized market value.¹ It is no objection that the knowledge of the witness was acquired wholly from an inspection of bills of the goods,² from market reports,³ or from personal inquiries made by him.⁴ His evidence is not thereby rendered inadmissible if the witness is otherwise qualified by experience and has examined the goods or premises in question.⁵ The plaintiff has been permitted to give his opinion of the value of his goods which were damaged, where he was also able to state the facts on which the opinion was based.⁶ Where the production of an article is impossible because of its loss or destruction, its value may be proved by comparison. It is necessary first to prove the resemblance of the lost article to one which can be produced, and this can be done by a witness who is not an expert.⁷ The value of the latter article may then be shown by expert testimony, and on the evidence of both witnesses thus connected the jury may base their verdict as to the value of the missing article.⁸

§ 200. Underwriters as experts.—There is a seeming confusion in the decisions upon the question of the admissibility of expert evidence in actions which are brought upon policies of insurance. Where the increase of risk or breach of condition is such that any ordinary person would be able to form a conclusion; as, for example, whether leaving a dwelling-house unoccupied for a considerable length of time is an in-

¹ *Sistare v. Olcott*, 15 N. Y. State Rep. 248.

² *Epos v. St. Paul F. & Marine Ins. Co.* (S. D., 1894), 57 N. W. Rep. 919.

³ *Rodee v. Detroit Fire & Mar. Ins. Co.*, 26 N. Y. S. 242; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *Gulf, C. & S. F. R. Co. v. Patterson* (Tex., 1894), 24 S. W. Rep. 349.

⁴ *Jones v. Snyder*, 117 Ind. 229; *Phenix Ins. Co. v. Copeland*, 86 Ala. 551; *Griswold v. Gebbie*, 126 Pa. St. 853; *Forbes v. Howard*, 4 R. I. 364.

⁵ *Stillwell & B. Mfg. Co. v. Phelps*,

130 U. S. 520; *Harris v. Schuttler* (Tex., 1894), 24 S. W. Rep. 989; *Bischoff v. Schmetz*, 5 N. Y. S. 757; *Roberts v. Boston*, 149 Mass. 346; *Michael v. Crescent Pipe Line Co.* (Pa., 1893), 28 Atl. Rep. 204.

⁶ *Rodee v. Detroit F. & M. Ins. Co.*, 26 N. Y. S. 242. As to the necessity of experts stating their means of knowledge, see *Ft. Worth, etc. Co. v. Hurd* (Tex., 1894), 24 S. W. Rep. 995.

⁷ *Berney v. Dinsmore*, 141 Mass. 43.

⁸ *Home Ins. Co. v. Weide*, 11 Wall. (U. S.) 438.

crease of risk, the evidence of an expert is not admissible.¹ But where the question is whether in a certain case a higher premium would have been charged, the evidence of an insurance expert is admissible to show that fact, under the rule which permits the introduction of evidence of usage. Here the evidence of the expert is not his opinion, but evidence as to the fact or usage, and the inferences therefrom are for the jury.² So expert evidence is inadmissible as to the quantity of goods burned, based upon the amount of the *debris*,³ as to the origin of a fire,⁴ or whether the use of an engine without a spark-arrester is likely to cause fires.⁵ A physician may testify in an action on a life insurance policy that a certain habit, disease or injury may cause death;⁶ but, generally, where the question is, Was the person a good risk or insurable, or were there material misrepresentations? the opinion of an expert will not be received.⁷

¹ *Hahn v. Guardian Assur. Co.* (Or., 1893), 32 Pac. Rep. 683; *Milwaukee v. Kellogg*, 94 U. S. 649; *Anthony v. German Am. Ins. Co.*, 48 Mo. App. 65; *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375; *Carmell v. Phenix Ins. Co.*, 59 Me. 582; *Luce v. Dorch. M. F. I. Co.*, 105 Mass. 497; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Hill v. Lafayette Ins. Co.*, 2 Md. 476; *Hartford Pro. Ins. Co. v. Harmer*, 2 Ohio St. 452.

² *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282; *First Church v. Holyoke M. Ins. Co.*, 33 N. E. Rep. 572 (Mass., 1893); *Hawes v. N. E. Ins. Co.*, 2 Curt. C. C. 229; *Luce v. Insurance Co.*, 105 Mass. 297; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Loomis v. Insurance Co.*, 81 Wis. 366; 51 N. W. Rep. 564; *Lyman v. State Ins. Co.*, 14 Allen (Mass.), 329; *Pelzer Manuf. Co. v. Sun Fire Office of London*, 36 S. C. 213; 15 S. E. Rep. 562; *Cornish v. Farm Bld. Ins. Co.*, 74 N. Y. 275; *Hobby v. Dana*, 17 Barb. 111; *Keeu v. South St. Louis Co.*, 40 Mo. 19. A witness cannot

be asked, where the question in issue is, Was a misrepresentation or concealment material? whether he considered it so, or would he have taken the risk if the fact concealed had been made known, or what influence the fact concealed would have had if known. But he may be asked what effect it actually had. *Abbott's Trial Ev.*, 494, citing *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133.

³ *Birmingham F. Ins. Co. v. Pulver*, 27 Ill. App. 17; 126 Ill. 329.

⁴ *Cook v. Johnston*, 58 Mich. 437.

⁵ *Teal v. Barton*, 40 Barb. (N. Y.) 137. Cf. *Hays v. Miller*, 70 N. Y. 112; *Higgins v. Dewey*, 107 Mass. 494; *Frace v. N. Y., L. E. & W. R. Co.*, 22 N. Y. S. 958.

⁶ *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa, 216.

⁷ *Rawls v. Am. L. Ins. Co.*, 36 Barb. 357; 27 N. Y. 282; *Wich v. Equitable F. & M. Ins. Co.* (Colo., 1893), 31 Pac. Rep. 389; *Pelzer Manuf. Co. v. German Ins. Co. of New York*, 36 S. C. 213.

§ 201. **Experiments in and out of court.**— The witness, if he is not an expert, will not be permitted to testify to the result of experiments which have been made out of court.¹ But where the circumstances or conditions existing or alleged to exist in the case at trial and surrounding the subject-matter are reproduced at the time of the experiment, a witness who is an expert may state his opinion together with the result of an experiment made by him out of court.² An expert may be allowed to conduct an experiment in court to illustrate or emphasize his testimony, provided it is shown by independent evidence that the exact conditions alleged to have existed are reproduced before the jury.³ Thus, where a machine was alleged to be defective, the defendant was allowed to operate it before the jury to show that the reason of its defective operation was the unskilfulness or physical weakness of the plaintiff.⁴ So, too, an expert may be allowed to subject a writing purporting to be a will to a test with chemicals to ascertain the character of the ink and whether the instrument had been tampered with.⁵ Comparisons may also be made by expert witnesses in court. So where the quality of an ar-

¹ *State v. Justus*, 11 Oreg. 170; *Com. v. Fairchell*, 1 Brewst. (Pa.) 566.

² *Williams v. Taunton*, 125 Mass. 54; *Sullivan v. State*, 93 Pa. St. 285; *Eidt v. Cutter*, 127 Mass. 523; *Com. v. Piper*, 120 id. 188; *Burg v. Chicago, R. I. & P. Ry. Co.* (Iowa, 1894), 57 N. W. Rep. 680; *Boyd v. State*, 14 Lea (Tenn.), 161; *Brook v. Chicago, etc. Co.* (Iowa, 1891), 47 N. W. Rep. 74; *State v. Jones*, 41 Kan. 309. That the adverse party was not present in person or by his agent when the experiment was made is immaterial. *Burg v. Chicago, R. I. & Pac. Ry.*, 57 N. W. Rep. 680 (Iowa, 1894). In a criminal trial, the state being permitted to prove experiments, it is reversible error to refuse the defendant the right to introduce the same sort of evidence in rebuttal. *Smith v. State*, 2 Ohio St. 513.

³ *State v. Smith*, 49 Conn. 376; *Siberry v. State* (Ind., 1893), 33 N. E. Rep. 681; *State v. Fletcher* (Oreg., 1893), 33 Pac. Rep. 575; *In re Monroe's Est.*, 1 Con. Sur. 496; 23 Abb. N. C. 83; *Leonard v. Southern Pac. R. Co.*, 21 Oreg. 555; *People v. Hope*, 62 Cal. 291; *Osborne v. Detroit*, 32 Fed. Rep. 38.

⁴ *Nat. etc. Co. v. Southern Pac. R. Co.*, 85 Mich. 255; *Probert v. Phipps*, 149 Mass. 258. As to articles in court, see *ante*, §§ 38, 39. Where the experiment will consume some time, it is not an abuse of judicial discretion for which a new trial will be granted for the court to refuse to permit the experiment to be made in open court. *People v. Levire*, 85 Cal. 39; 24 Pac. Rep. 631.

⁵ *In re Monroe*, 1 Con. Sur. 496; 5 N. Y. S. 552; 23 Abb. N. C. 83.

ticle or its adaptability to a certain purpose is in issue, a sample of the article in question may be shown to the jury together with a sample of a similar article which the witness has testified was of good quality or was well adapted for the purpose required, and the jury may be allowed to compare them to ascertain the points of difference, if any.¹

§ 202. Physical examination of the party by experts.—

The question whether the court in civil cases can compel the plaintiff to furnish evidence by submitting to a physical examination by a physician has been differently decided. The affirmative is supported by a majority of the cases, which maintain that the courts have an inherent power to do this, basing their reasoning upon the necessity for the inspection,² though there are other cases sustaining the proposition that, while such an inspection may be allowed, it cannot in the absence of a statute be compelled.³

Where the annulment of a marriage is asked for by one of the parties thereto upon the ground of the impotency of the other, the court may compel him or her to submit to an examination by a competent physician or midwife.⁴ In such a

¹ *People v. Buddensieck*, 103 N. Y. 498; 5 N. Y. Crim. Rep. 69.

² *Graves v. Battle Creek* (Mich., 1893), 54 N. W. Rep. 757; *Winnerv. Lathrop*, 67 Hun, 511; *International, etc. Co. v. Underwood*, 64 Tex. 464; *Kinney v. Springfield*, 35 Mo. App. 297; *White v. Milw. etc. Co.*, 61 Wis. 536; *A., T. & S. F. R. Co. v. Thul*, 29 Kan. 466; *Walsh v Sayre*, 52 How. Pr. 384; *Terre Haute, etc. Co. v. Brincker*, 128 Ind. 542; *Miami, etc. Co. v. Baily*, 37 Ohio St. 104; *Shephard v. Railway Co.*, 85 Mo. 629; *Schroeder v. Railway Co.*, 47 Iowa, 375. The necessity for the examination must be affirmatively shown (*Bridge Co. v. Miller* (Ill., 1893), 28 N. E. Rep. 1091; *Joliet R. Co. v. Caul*, 42 Ill. App. 41), and the selection of the physician is within the discretion of the court (*Alabama, etc. Co. v. Hill*, 94 Ala. 514); though if the plaintiff is willing to be ex-

amined by any disinterested person, a physician need not be appointed. *Gulf, etc. Co. v. Norfleet* (Tex., 1891), 14 S. W. Rep. 703. As a means of exposing malingering and of ascertaining the exact character and extent of a local physical injury, such an examination, if properly and fairly conducted, would seem unobjectionable upon either ethical or legal grounds. It should be promptly applied for before the plaintiff has testified, unless from his evidence it appears that he is feigning. *Galesburg v. Benedict*, 22 Ill. App. 111.

³ *Hess v. Lake Shore & M. Co.*, 7 Pa. Co. Ct. Rep. 565; *Stuart v. New Haven*, 17 Neb. 211; *Parker v. Enslow*, 103 Ill. 272; *Shephard v. Railway Co.*, 85 Mo. 629; *Peoria, etc. Co. v. Rice* (Ill., 1893), 33 N. E. Rep. 951; *St. Louis Bridge Co. v. Miller*, 138 Ill. 455.

⁴ *Anonymous* (Ala., 1890), 7 S. Rep.

delicate matter the feelings of the party who is to be examined ought to be respected so far as is consistent with a due administration of justice. So a physical examination in the case of alleged impotency being justified solely by the necessity of the case should only be ordered when the need for it is positively and affirmatively shown.¹ If the party resists the appointment of a physician or refuses to be examined, a rebuttable presumption of his or her impotency will be created thereby,² which it is then incumbent on him or her to overcome.

Under the rule that an accused person is not compellable to furnish evidence against himself, a court, it has been held, has no power to compel a prisoner to submit to an examination by an expert.³ Accordingly, evidence which has been procured by a compulsory comparison of the shoes of the defendant with footprints observed near the locality of the crime should be rejected.⁴ Where the mental and physical condition of the accused is voluntarily put in issue by him by a plea of insanity, no injustice will result in his being compelled by the court to submit to a physical examination by a competent physician, and this, accordingly, may be done.⁵ So the court may compel a party in a civil suit to unveil in order that she may be identified by a witness in court.⁶

100; *Brown v. Brown*, 1 Hagg. 523; *Newell v. Newell*, 9 Paige (N. Y.), 26; *Dean v. Aveling*, 1 Rob. 279; *Devenbaugh v. Devenbaugh*, 5 Paige, 554; *Welde v. Welde*, 2 Lee, 580; *Briggs v. Morgan*, 3 Phil. 325; *H— v. P—*, L. R. 3 P. & D. 126; *G— v. G—*, L. R. 2 P. & D. 287.

¹ *Newell v. Newell*, 9 Paige, 26.

² *Harrison v. Harrison*, 4 Moore P. C. 96; *H— v. P—*, L. R. 3 P. & D. 126; *Pollard v. Seybourn*, 1 Hagg. 75.

³ *State v. Johnson*, 67 N. C. 58; *People v. McCoy*, 45 How. Pr. (N. Y.) 216.

⁴ *Day v. State*, 63 Ga. 667; *Stokes v. State*, 5 Baxt. (Tenn.) 619; *People v. Mead*, 50 Mich. 228. *Contra*, *State v. Graham*, 74 N. C. 646; *Walker v. State*, 7 Tex. App. 245. In *State v. Garrett*, 71 N. C. 85, and *Spicer v. State*, 69 Ala. 159, physicians were permitted to testify to the result of the examination of the accused.

⁵ *Pierson v. People*, 79 N. Y. 424; *People v. Taylor*, 138 N. Y. 398. See *ante*, § 178; *post*, § 351.

⁶ *Rice v. Rice* (N. Y., 1891), 19 Atl. Rep. 736.

CHAPTER XVI.

PAROL OR EXTRINSIC EVIDENCE AS RELATED TO WRITINGS.

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| <p>§ 205. Parol evidence, when inadmissible.</p> <p>206. Interpretation and construction of writings.</p> <p>207. Rule applies between parties only.</p> <p>208. Invalidity of writings — Evidence to vary or explain or show real consideration.</p> <p>209. Incomplete and collateral writings.</p> <p>210. Parol evidence to connect and explain contemporaneous writings.</p> <p>211. Receipts.</p> <p>212. Independent parol contracts and conditions precedent.</p> <p>213. To establish implied, resulting or constructive trusts.</p> | <p>§ 214. Discharge, modification or extension of contract may be shown.</p> <p>215. To rebut presumptions.</p> <p>216. To show usage.</p> <p>217. To explain technical terms.</p> <p>218. Abbreviations.</p> <p>219. The relations of the parties.</p> <p>220. To ascertain or explain subject-matter.</p> <p>221. Ambiguities defined and distinguished — Parol evidence to explain.</p> <p>222. Parol evidence as applicable to wills.</p> <p>223. Parol evidence to show absolute deed a mortgage and in suits for specific performance and reformation or cancellation.</p> |
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§ 205. **Parol evidence, when inadmissible.**—Parol evidence is not admissible to control, add to, vary or contradict the language of a valid written instrument.¹ The words “written instrument,” thus used, do not refer to or include everything which has been committed to writing and which has passed between the parties. The rule is designed to protect the honest, careful and prudent in their contracts and business transactions against the results of fraud and perjury, carelessness and inaccuracy. By it evidence of the intention

¹ 1 Greenl. on Ev., § 275. By parol evidence is meant oral evidence or the statements of witnesses made *viva voce*, as distinguished from documentary evidence. Its meaning is, however, sometimes extended so as to include preliminary or unexecuted memoranda or notes in writing which have passed between the parties prior to the execution of the deed or final written contract which is in question. Anderson's Dict.

of the parties is furnished, which can always be produced without fear of change or liability to misconstruction.¹ Such documents only are within the rule which represent and contain the deliberate intention of the parties; and the existence of deliberation in making the agreement may usually and justly be inferred from the use of language which creates a valid contractual obligation, the subject and extent of which must be ascertained from the writing alone.² This rule doubtless had its origin in the once universal custom of the parties to a written agreement affixing their seals, and this solemn and formal act, as it was regarded from the common-law standpoint,³ impressed a fixed and unchangeable character on the instrument, which demanded the exclusion not only of all verbal modifications of it, but of unsealed writings as well.⁴ With the increase in the use of writing attendant upon the increase of education and the spread of commerce and manufacture in recent times, the operation of the rule was extended to simple or unsealed writings. The rule has been applied to court records⁵ and public records generally;⁶ to the written awards of arbitrators;⁷ to deeds of conveyance,⁸ mortgages,⁹ minutes of private corporations,¹⁰ leases,¹¹ assignments,¹² con-

¹ *Union M. Ins. Co. v. Wilkinson*, 13 Wall. 231.

² See *post*, § 209.

³ 2 Bl. Com. 305-6.

⁴ See the remarks of Parker, J., in *Stackpole v. Arnold*, 11 Mass. 31.

⁵ *Armstrong v. St. Louis*, 69 Mo. 309; *Roche v. Beldam*, 119 Ill. 320; *Dugger v. Taylor*, 46 Ala. 320; *Royce v. Burt*, 42 Barb. (N. Y.) 339; *Bays v. Trulson* (Oreg., 1894), 35 Pac. Rep. 26; *Ney v. Dubuque, etc. Co.*, 20 Iowa, 347.

⁶ *Williams v. Ingell*, 21 Pick. (Mass.) 288; *McMicken v. Com.*, 58 Pa. St. 213; *Crommett v. Pearson*, 18 Me. 344; *Vogler v. Spaugh*, 4 Biss. (U. S.) 288; *Carroll v. O'Conner* (Ind., 1894), 35 N. E. Rep. 1006.

⁷ *Jones v. Perkins*, 54 Me. 393.

⁸ *Kelley v. Saltmarsh*, 146 Mass. 585; *Hancock v. McAvoy* (Pa., 1893),

25 Atl. Rep. 48; *Lowdermilk v. Bostick*, 98 N. C. 299; *Sage v. Jones*, 47 Ind. 122; *Lear v. Durgin*, 64 N. H. 618; *Miller v. Fletcher*, 27 Gratt. (Va.) 403; *Warren v. Miller*, 38 Me. 108; *Richards v. Crocker*, 66 Hun, 629; *Ritchie v. Pease*, 114 Ill. 353.

⁹ *Union Nat. Bank v. Int. Bank*, 22 Ill. App. 652; *Beall v. Fisher*, 95 Cal. 568; *Whitney v. Phelps*, 33 Me. 318; *Lindsay v. Garvin*, 31 S. C. 259; *Van Evera v. Davis*, 51 Iowa, 637.

¹⁰ *San Joaquin v. Beecher* (Cal., 1894), 35 Pac. Rep. 349.

¹¹ *Welch v. Horton*, 73 Iowa, 250; *Tracy v. Iron Works*, 29 Mo. App. 342; *Howard v. Thompson*, 12 Ohio St. 201; *Knapp v. Marlboro*, 29 Vt. 282; *Pickett v. Ferguson*, 45 Ark. 177.

¹² *Osgood v. Davis*, 18 Me. 146;

tracts to sell real¹ or personal property,² bonds,³ charter-parties,⁴ insurance policies,⁵ negotiable instruments,⁶ the indorsements thereon,⁷ guaranties,⁸ licenses,⁹ releases,¹⁰ and contracts in general.¹¹

§ 206. **Interpretation and construction.**—If the parties to a commercial transaction have committed the whole of their agreement to writing, it may be presumed, according to well-known commercial and social usages, that the writing embodies their final contract, and that all prior or contemporaneous oral stipulations or negotiations are merged in it and superseded by it.¹² The language of the writing is conclusive,

Moore v. Voss, 1 Cranch (C. C.), 179; Taylor v. Sayre, 24 N. J. L. 617; Gilmore v. Bangs, 55 Ga. 403.

¹ Mickelson v. Reves, 94 N. C. 559; Hubbard v. Marshall, 50 Wis. 322; Lloyd v. Farrell, 48 Pa. St. 73; Ripley v. Paige, 12 Vt. 353.

² Union Stock Yards Co. v. Cattle Co., 59 Fed. Rep. 49; Davis v. Moody, 15 Ga. 175; Belcher v. Mulhall, 57 Tex. 17; Procter v. Cole, 66 Ind. 576; Cushing v. Rice, 46 Me. 303; Epping v. Mockler, 55 Ga. 376.

³ Barnett v. Barnett, 83 Va. 504; McGoonney v. State, 20 Ohio St. 93.

⁴ The Augustine Kobbe, 37 Fed. Rep. 696.

⁵ M. B. L. I. Co. v. Ruse, 8 Ga. 536; Russell v. Russell, 64 Ala. 500; Lewis v. Thatcher, 15 Mass. 431; Mayor v. Brooklyn F. I. Co., 3 Abb. App. Dec. 251; Giddings v. Phoenix Ins. Co., 90 Mo. 272.

⁶ Burns v. Scott, 117 U. S. 582; Foy v. Blackstone, 31 Ill. 538; Catlin v. Harris (Wash., 1894), 35 Pac. Rep. 385; Anspach v. Bast, 52 Pa. St. 356; Clark v. Hart, 49 Ala. 86; McPherson v. Weston, 85 Cal. 90; Goddard v. Hill, 33 Me. 582; Campbell v. Upshur, 3 Humph. (Tenn.) 185; Trustees v. Stetson, 5 Pick. (Mass.) 506; Youngberg v. Nelson (Minn., 1893), 53 N. W. Rep. 629; Long v. Johnson, 24 N. H. 302.

⁷ Halladay v. Hart, 30 N. Y. 474; Bartlett v. Lee, 33 Ga. 491; Kern v. Van Phul, 7 Minn. 426; Buckley v. Bentley, 48 Barb. (N. Y.) 233.

⁸ Lazear v. Union Bank, 52 Md. 78.

⁹ Ives v. Williams, 50 Mich. 100.

¹⁰ Leddy v. Barney, 139 Mass. 394.

¹¹ Amer. S. Co. v. Thurber, 121 N. Y. 655; 24 N. E. Rep. 1129; Mittnacht v. Slevin, 67 Hun, 315; Davis v. Stout (Ind., 1890), 25 N. E. Rep. 862; Stillings v. Tinmis (Mass., 1890), 25 N. E. Rep. 569; Jennings v. Moore (Mich., 1890), 47 N. W. Rep. 127; Tarbell v. Farmers' Ins. Co. (Minn., 1890), 47 N. W. Rep. 152; Van Horn v. Van Horn (N. J., 1892), 23 Atl. Rep. 1079; Watson v. Miller, 82 Tex. 279; Dexter v. Ohlander, 93 Ala. 441; Van Fleet v. Sledge, 45 Fed. Rep. 743; Chase v. Jewett, 37 Me. 351; Lyon v. Miller, 24 Pa. St. 392; Atkins v. Tompkins, 155 Mass. 256; Vance v. Wood, 22 Ore. 77.

¹² Pirson v. Arkenbergh, 59 N. Y. Super. Ct. 574; Hardin v. Kelly (Va., 1893), 15 S. E. Rep. 894; Taylor v. Davis, 82 Wis. 455; Elevator Co. v. Towboat Co., 155 Mass. 211; Shelmire v. Williams, etc. Co., 68 Hun, 196; Stull v. Thompson, 154 Pa. St. 43; Societe v. Sulzer, 138 N. Y. 468; Beall v. Fisher, 95 Cal. 568; Richmond, etc. Co. v. Shomo (Ga., 1893), 16 S. E. Rep. 220. Negotiations are

and the only office of the court is to interpret and construe it so that its actual meaning may be effectuated.¹ Nor does it lie in the discretion of the court to ascertain what secret meaning may have been intended, or whether the parties had any meaning which is not expressed by the language of the writing itself, unless upon its face it is incomplete and silent as to some material fact.²

The terms "interpretation" and "construction" are sometimes used interchangeably. The process of interpretation usually precedes that of construction, and may be defined with accuracy as the act of finding out the true sense of any form of words, *i. e.*, the meaning their author intended, and of enabling others to derive from them the same idea that he entertained.³ By construction is meant the process of drawing conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text, *i. e.*, conclusions within the spirit, though not always within the strict letter, of the text⁴ of the writing.

Construction may be *liberal*, enlarging or restricting the meaning of the literal language of the writing which is construed, or *strict*, *i. e.*, confining the application of the words to such cases or objects as are clearly described by the terms employed. But a liberal construction should not be such as by the aid of extrinsic evidence forces words out of their natural signification, or affixes a meaning to them which was never intended by their author, but only such a fair, just and reasonable construction as will fully effectuate the instrument and carry out the intention of the parties thereto.⁵ A reasonable construction of an instrument, as opposed to one which is forced, artificial or strained, is such a construction as will

merged in the writing the moment a stamped letter assenting to the terms is mailed. *Darlington I. W. v. Foote*, 16 Fed. Rep. 645; *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 163. See *ante*, §§ 30-39.

¹ *Culver v. Wilkinson*, 145 U. S. 205; *National G. L. Co. v. Bixby* (Minn., 1892), 57 N. W. Rep. 217; *Stover v. Rogers*, 3 Wash. St. 603;

Hardin v. Kelly (Va., 1893), 15 S. E. Rep. 894.

² See *post*, § 209.

³ *Anderson's Law Dict.*, citing *Lieber*, Herm. 23; 1 Bl. Com. 59; 2 *Parson's Cont.* (7th ed.) 491.

⁴ *Anderson's Law Dict.*, *Lieber*, Herm. 44, 11.

⁵ *Lawrence v. McCalmont*, 2 How. 449; *Crist v. Burlingame*, 62 Barb. 355.

most effectually favor and bring about the apparent intention. If any word or clause has two meanings, the meaning which is most consonant with the intention of the parties as gathered from the whole instrument, considered in its entirety, should be permitted to prevail.¹ When, however, the language is reasonably clear, so that the jury can readily understand the meaning of the instrument, there is no room for construction. "There should be no construction where there is nothing to construe."²

The interpretation and construction of writings are governed by legal rules and are exclusively within the province of the judge.³ So far, however, as the whole contract is incapable of intelligible construction by the court from an exclusive consideration of its language, that is, so far as extrinsic evidence is necessary to explain its terms or its subject-matter, to identify the parties, or to show their relations to each other and the circumstances surrounding them, the matter is for the jury, who are of course to be guided in their determination by the principles of law governing the construction of contracts laid down by the court, so far as these principles are applicable to the actual state of facts found by the jury.⁴ A writing should be construed in its entirety to ascertain its meaning and effect. If the meaning of written and printed clauses is contradictory, the meaning of the former will prevail over that of the latter, on the presumption that, being more deliberately framed, they represent more accurately the meaning of the parties.⁵

In the construction of a contract the courts will follow the construction which the parties to the contract have themselves put upon the particular agreement or upon others of a similar description. If, therefore, a contract is doubtful in its meaning, evidence is admissible to show how the contracting parties regarded or construed the writing by pointing out their

¹ 2 Bl. Com. 296-309, 379-381; 2 Kent, 422; Tiedeman on Wills, §§ 171 et seq., 205-211.

² Lewis v. United States, 92 U. S. 621; Benn v. Hatcher, 81 Va. 34.

³ People's Nat. Gas Co. v. Fidelity Tit. & Trust Co., 24 Atl. Rep. 339; 150 Pa. St. 8.

⁴ Cosper v. Nesbit, 45 Kan. 457; Spragins v. White, 108 N. C. 449; Deutman v. Kilpatrick, 46 Mo. App. 624.

⁵ Boorman v. Johnston, 12 Wend. 573; Webb v. Webb, 29 Ala. 605; Duffield v. Hue, 129 Pa. St. 94; McNear v. McComber, 18 Iowa, 7.

actions in relation to the subject-matter. Where, by such extrinsic evidence, a continued course of dealing or acting prior to the execution of the contract under consideration is established, it is very fair to presume that the intention of the parties was to adhere to their usual and ordinary method of transacting business.¹

§ 207. Rule applies only between parties.—Where a writing is offered in evidence in an action between persons who are not parties or privies to it, the rule excluding parol evidence does not apply; and, because it would be extremely unjust to consider a person bound by language in whose selection he took no part, they are not prevented from showing the true meaning of a writing by contradictory oral evidence.² In a suit between a party and a stranger to a writing, the former may, unless estopped by his conduct, contradict the writing by parol.³

§ 208. Invalidity of writing—Evidence to explain or vary consideration.—The invalidity or legal insufficiency of an instrument or of a part of it may be shown by a party by parol.⁴

¹ *Procter v. Snodgrass*, 6 Ohio Cir. Ct. Rep. 547; *Goneding v. Hammond*, 49 Fed. Rep. 443; *Bement v. Claybrook* (Ind., 1892), 31 N. E. Rep. 556; *Davis v. Shafer*, 50 Fed. Rep. 764; *Hosmer v. McDonald* (Ark., 1893), 19 S. W. Rep. 963; *Leavitt v. Windsor Land & Investment Co.*, 54 Fed. Rep. 459; *People's Nat. Gas Co. v. Braddock Wire Co.* (Pa., 1893), 25 Atl. Rep. 749; 155 Pa. St. 22; *Hammerquist v. Swenson*, 44 Ill. App. 627; *Cavazos v. Trevino*, 6 Wall. (U. S.) 773.

² *Randolph v. Junker*, 1 Tex. Civ. App. 517; *Burns v. Thompson*, 91 Ind. 146; *McMaster v. Insurance Co.*, 55 N. Y. 222; *Sheehy v. Fulton* (Neb., 1894), 57 N. W. Rep. 395; *Bareda v. Silsby*, 21 How. (U. S.) 146; *Finley v. Bogan*, 20 La. Ann. 443; *Fant v. Sprig*, 50 Md. 551; *Furbush v. Godwin*, 25 N. H. 425; *Russell v. Carr*, 38 Ga. 459; *Cunningham v. Minor*, 56 Ala. 522; *Fonda v. Burton*, 63

Vt. 355; *Bruce v. Lumber Co.*, 87 Va. 381; *Fox v. McComb*, 63 Hun. 633; *Kellogg v. Thompson*, 142 Mass. 76; *Reynolds v. Magness*, 2 Ired. 26; *Talbot v. Wilkins*, 31 Ark. 411; *Hussman v. Wilkie*, 50 Cal. 250; *Bell v. Woodman*, 60 Me. 465.

³ *Venable v. Thompson*, 11 Ala. 147. So in a suit for contribution between sureties either of them may vary the terms of a writing to which the principal is a party. *Thomas v. Truscott*, 53 Barb. (N. Y.) 200; *Barry v. Raison*, 1 Kernan (N. Y.), 462.

⁴ *Hamburg v. Wood*, 18 S. W. Rep. 623 (Tex., 1892); *Blythe v. Gibbons* (Ind., 1894), 35 N. E. Rep. 557; *Lunday v. Thomas*, 26 Ga. 533; *Benecia Works v. Estes* (Cal., 1892), 32 Pac. Rep. 938; *Snyder v. Jennings*, 15 Neb. 372; *Corbin v. Sistrunk*, 19 Ala. 203; *Grayson v. Brooks*, 64 Miss. 410; *Cummings v. Powell* (Mo., 1893), 21 S. W. Rep. 1079; *Sherman v. Buick*,

So it may be shown by parol that the execution of the instrument, whether record, deed or simple contract, was procured by fraud or duress practiced upon the party,¹ or that he had been made intoxicated so that he did not fully comprehend the nature of his act.²

At common law a seal created a conclusive presumption of a due and valuable consideration, and the parties were estopped from denying this, though no consideration was mentioned in the instrument.³ Where a writing is not under seal, and in equity when under seal,⁴ parol evidence is admissible to vary the consideration, except in the case of negotiable paper which is in the hands of a *bona fide* holder for value.⁵

93 U. S. 209; *Davis v. Stern*, 15 La. Ann. 177; *Farrell v. Bean*, 10 Md. 217; *Dana v. Sessions* (Vt., 1893), 26 Atl. Rep. 585; *Holbrook v. Burt*, 22 Pick. (Mass.) 546. A judgment may thus be impeached by parol proof that a party was not served. *Norton v. Atchison*, 80 Pac. Rep. 585.

¹ *Kranich v. Sherwood*, 52 N. W. Rep. 741; 92 Mich. 397; *Wharton v. Douglass*, 76 Pa. St. 273; *McKesson v. Sherman*, 51 Wis. 303; *N. J. Mut. L. I. Co. v. Baker*, 94 U. S. 610; *Cooper v. Finke*, 38 Minn. 2; *Thompson v. Bell*, 37 Ala. 438; *Officer v. Howe*, 32 Iowa, 142; *Vicknair v. Trosher* (La., 1893), 12 S. Rep. 486; *Thorne v. Trav. Ins. Co.*, 80 Pa. St. 15; *Univ. Fash. Co. v. Skinner*, 64 Hun, 293; *Childs v. Dobbins*, 61 Iowa, 109; *Plant v. Condit*, 22 Ark. 454; *Ewing v. Smith*, 132 Ind. 205; *Willis v. Kern*, 21 La. Ann. 749; *Baldwin v. Burrows*, 95 Ind. 81; *Gross v. Drager*, 66 Wis. 150; *Depue v. Sargeant*, 21 W. Va. 326. Parol evidence is received to show that a deed was delivered and whether the delivery was absolute or in escrow. *Adams v. Morgan*, 150 Mass. 148.

² *Johnson v. Phifer*, 6 Neb. 401; *Lavette v. Sage*, 29 Conn. 577; *Fetrill v. Fetrill*, 5 Jones' Eq. 61; *Schramm v. O'Conner*, 98 Ill. 539;

Harbison v. Lemon, 3 Blatchf. 51; *Dunn v. Amos*, 14 Wis. 106; *Loftus v. Maloney* (Va., 1893), 16 S. E. Rep. 749; *Rottenburgh v. Fowl* (N. J., 1893), 26 Atl. Rep. 338.

³ *Tiedeman on R. P.*, § 801; *Wilkinson v. Scott*, 17 Mass. 257; *Goodspeed v. Fuller*, 46 Me. 141; *Rockwell v. Brown*, 54 N. Y. 213; *Mendenhall v. Parish*, 8 Jones' L. 108; *Kimball v. Walker*, 30 Ill. 511; *Wing v. Peck*, 54 Vt. 245; *Trafton v. Hawes*, 102 Mass. 541; *State v. Gott*, 44 Md. 341; *Storm v. United States*, 94 U. S. 84; *Erickson v. Brant* (Minn., 1893), 55 N. W. Rep. 62; *Harris v. Harris*, 23 Gratt. 737; *Lake v. Gray*, 35 Iowa, 402; *Rhine v. Ellen*, 36 Cal. 362.

⁴ *Levi v. Welsh*, 45 N. J. Eq. 867; *Fechheimer v. Trounstone*, 13 Colo. 386; *Lanier v. Faust*, 16 S. W. Rep. 994; *Ewing v. Wilson* (Ind., 1892), 31 N. E. Rep. 64; 132 Ind. 600.

⁵ *Volkenan v. Drum*, 154 Pa. St. 616; *Stackpole v. Arnold*, 11 Mass. 27; *Terry v. Danville, etc. Co.*, 91 N. C. 236; *Silvers v. Potter*, 48 N. J. Eq. 539; *Rabsuhl v. Lack*, 35 Mo. 316; *Tutwiler v. Munford*, 68 Ala. 124; *Rhine v. Ellen*, 36 Cal. 362; *King v. Woodruff*, 23 Conn. 56; *Howell v. Moores*, 127 Ill. 86; *Bragg v. Standford*, 82 Ind. 324; *Wheeler*

Where the validity of an instrument is impeached upon the ground of fraud, the courts are disposed to grant a wide latitude in this respect.¹ Thus, the invalidity,² illegality³ or immorality⁴ of the consideration may be shown by parol in an action between the immediate parties to the contract. So in a proceeding by the grantor to recover the purchase-money, the real consideration may be shown by parol evidence.⁵ Parol evidence is admissible to show an additional or further consideration to that expressed,⁶ and the additional consideration which is thus shown need not always be consistent in character with the consideration which is recited in the writing.⁷ Where the writing is silent as to consideration, oral evidence is admissible to prove that a consideration passed and to show its character and extent.⁸

v. Billings, 38 N. Y. 263; *Fraley v. Bentley*, 1 Dak. 25; *Bailey v. Cornwell*, 66 Mich. 107; *Leach v. Shelby*, 58 Miss. 681; *Sayre v. Burdick*, 47 Minn. 367; *Kidder v. Vandersloat*, 114 Ill. 130; *Pomeroy v. Bailey*, 43 N. H. 118; *Barbee v. Barbee*, 109 N. C. 299; *Cake v. Bank*, 116 Pa. St. 264; *Fechheimer v. Trounstone*, 13 Colo. 386; *Louisville R. R. Co. v. Neafus* (Ky., 1892), 18 S. W. Rep. 1030; *Bruce v. Slemph*, 82 Va. 357; *Pierce v. Brew*, 43 Vt. 292; *Wooster v. Simonson*, 20 Fed. Rep. 316; *Stiles v. Giddens*, 21 Tex. 783; *Green v. Batson*, 71 Wis. 57; *Hall v. Solomon*, 61 Conn. 476; *Hunter v. Lanius*, 82 Tex. 677. "A consideration is something esteemed in law as of value in exchange for which a promise is made." *Bishop, Cont.*, § 38.

¹ *Clinton v. Estes*, 20 Ark. 216; *Cunningham v. Dyer*, 23 Md. 219; *Fall v. Glover*, 34 Neb. 522; 52 N. W. Rep. 168.

² See cases in last note.

³ *Fenwick v. Ratcliffe*, 6 T. B. Mon. (Ky.) 154; *Cozard v. Hinman*, 6 Bosw. 8; *N. E. Mortg. Co. v. Gay*, 33 Fed. Rep. 636; *Martin v. Clarke*, 8 R. I. 389; *Russell v. De Grand*, 15

Mass. 35; *Ross v. Sagbeer*, 21 Wend. 106.

⁴ *Lazare v. Jacques*, 15 La. Ann. 599.

⁵ *McCrea v. Purmort*, 16 Wend. 465; *Rhine v. Ellen*, 36 Cal. 362.

⁶ *Penn. Co. v. Dolan* (Ind., 1890), 32 N. E. Rep. 802; *Hill v. Whidden* (Mass., 1893), 33 N. E. Rep. 526; *Ferris v. Hard*, 135 N. Y. 354; *Pierce v. Brew*, 43 Vt. 295; *Parker v. Foy*, 43 Miss. 260; *Harper v. Perry*, 28 Iowa, 63; *Paige v. Sherman*, 6 Gray, 511; *Rabsuhl v. Lack*, 35 Mo. 316; *Castor v. Fry*, 33 W. Va. 449; *Tiedeman on R. P.*, § 801.

⁷ *Bristol Sav. Bank v. Stiger* (Iowa, 1893), 53 N. W. Rep. 265; *Penn. Co. v. Dolan* (Ind., 1893), 52 N. E. Rep. 802; *Hill v. Whidden*, *supra*; *Mobile Sav. Bank v. McDonnell* (Ala., 1891), 8 S. Rep. 137; *Martin v. Stubblings*, 126 Ill. 387; *Diven v. Johnson*, 117 Ind. 512. Where evidence of a different consideration would make a new contract for the parties it should be excluded. *Stillings v. Timmins*, 152 Mass. 147; 25 N. E. Rep. 50; *Langan v. Langan*, 89 Cal. 186; 26 Pac. Rep. 794.

⁸ *Trustees v. Saunders* (Wis., 1893),

§ 209. Incomplete and collateral writings.—Where on inspecting a written contract it appears incomplete, so that it does not represent the final intention of the parties in language chosen by them, parol evidence is admissible to supply omissions and ascertain the actual intention on those particular points regarding which the written agreement is silent.¹ So parol evidence is admissible to supply a date in an acknowledgment of a debt;² to show the purpose of certain minor stipulations;³ to fix the time of performance,⁴ or to show a parol contract or a conversation referred to in the writing.⁵ But an omission cannot be supplied in a writing which is required by the statute of frauds.⁶ And the opera-

54 N. W. Rep. 1094; Guidery v. Pherson, 55 Fed. Rep. 558; McGreen, 95 Cal. 630; Dorsey v. Haggard, 5 Mo. 420; Miller v. Fechtborn, 31 Pa. St. 252; Macomb v. Wilkinson (Mich., 1890), 47 N. W. Rep. 336; Finlayson v. Finlayson, 17 Oreg. 347; Goodwin v. Fox, 129 U. S. 601; Bruce v. Slemple, 82 Va. 352; Rankin v. Wallace (Ky., 1890), 14 S. W. Rep. 79; Halpin v. Stone, 73 Wis. 183; 47 N. W. Rep. 177; Nichols v. Burch, 128 Ind. 324; 27 N. E. Rep. 737. In *McCrea v. Purmort*, 16 Wend. (N. Y.) 473; 30 Am. Dec. 103, Justice Cowan thus expounds the true rule on this subject: "A party is estopped by his deed. He is not permitted to contradict it so far as the deed is intended to pass a right, or to be the exclusive evidence of a contract. The principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration an objection to other proof of another and consistent consideration."

¹ *Smith v. Wood* (Ind., 1893), 32 N. E. Rep. 921; *Woolworth v. Mc-*

Grath v. Mongels, 20 N. Y. S. 869; *Kreuzberger v. Wingfield*, 96 Cal. 251; *Chapin v. Cambria S. Co.*, 145 Pa. St. 578; *Ostrander v. Snyder*, 26 N. Y. S. 263; *Edwards Co. v. Baker*, 2 N. D. 289; *Bretts v. Levine* (Minn., 1892), 52 N. W. Rep. 525; *Work v. Beach*, 129 N. Y. 651; *Crane v. Library Ass'n*, 29 N. J. L. 303; *Barclay v. Hopkins*, 59 Ga. 562; *Bank v. Cooper*, 137 U. S. 473; *Brown v. Bowen*, 90 Mo. 184; *Webster v. Hodgkins*, 25 N. H. 128; *Winn v. Chamberlain*, 32 Vt. 318; *Equator M. & S. Co. v. Gunella* (Colo., 1893), 33 Pac. Rep. 613; *Holmes v. Anderson*, 59 Tex. 481; *Donlin v. Daeglin*, 80 Ill. 608; *Sivers v. Sivers* (Cal., 1893), 32 Pac. Rep. 571; *Hawkins v. Lee*, 8 Lea (Tenn.), 42. The question whether the contract is complete is for the jury. *Thomas v. Barnes*, 31 N. E. Rep. 683; 56 Mass. 581.

² *Manchester v. Brodner*, 107 N. Y. 349.

³ *Equator Co. v. Gunella* (Colo., 1893), 33 Pac. Rep. 613.

⁴ *Sivers v. Sivers* (Cal., 1893), 32 Pac. Rep. 571.

⁵ *Nork v. Beach*, 129 N. Y. 621.

⁶ *Runger v. Holtzclaw*, 112 Mo. 519. See *post*, § 214.

tion of this rule is strictly confined to unintentional omissions, and does not permit the introduction of parol evidence to effectuate a writing which is wholly void because of uncertainty.¹ Nor is parol evidence admissible if the writing can by construction be given a reasonable meaning though some words have been omitted.² So it has been held that the oral portion of the contract is only admissible if the writing describes the subject-matter with binding force, and the oral part refers to collateral matters alone.³ The existence of a memorandum of a transaction, as a bill of parcels, will not exclude parol evidence of the real contract where the memorandum is not meant to be regarded as a contract containing the complete intention of the parties.⁴

§ 210. Parol evidence to connect and explain contemporaneous writings.—Two or more instruments evidencing the same transaction should be construed together. To enable the court to do this, parol evidence is admissible to show which was adopted as binding by the parties,⁵ or to connect them if the connection does not appear upon their face;⁶ and particularly if they are contradictory in terms,⁷ or if on comparison of the instruments certain clauses are found to be omitted⁸ from either. If a writing clearly refers to another, the latter will be admissible to explain it. The earlier deed or instrument by such reference becomes incorporated in the later to the same extent as though inserted in the subsequent

¹ McGuire v. Stevens, 42 Miss. 474; Walrath v. Whitlekind, 26 Kan. 482; Harvey v. Lumber Co., 39 Mo. App. 214.

² Looney v. Rankin, 15 Oreg. 617.

³ Chapin v. Dobson, 78 N. Y. 74.

⁴ Deshon v. Insurance Co., 11 Met. (Mass.) 199; Perrine v. Cooley, 39 N. J. L. 449; Kreuzberger v. Wingfield, 96 Cal. 251; Thomas v. Barnes, 156 Mass. 581; Robinson v. Mulder, 81 Mich. 75; Chapin v. Cambria Iron Co., 145 Pa. St. 478; Millet v. Marston, 62 Me. 477; Cone v. Cone, 107 Mass. 285; Smith v. Coleman, 77 Wis. 343.

⁵ Hill v. Miller, 76 N. Y. 32; Nor. M. Co. v. McAlister, 40 Mich. 84.

⁶ 1 Greenl. Ev., § 283; Wichita University v. Schweiter, 50 Kan. 672; Thomson v. Beal, 48 Fed. Rep. 614; Myers v. Munson, 65 Iowa, 423; Tuley v. Barton, 79 Va. 387; Lee v. Church, 52 Barb. (N. Y.) 116; Gilbert v. Duncan, 29 N. J. L. 133, 521; Eager v. Crawford, 76 N. Y. 97; Cullen v. Benim, 37 Ohio St. 326.

⁷ Payson v. Lampson, 134 Mass. 593.

⁸ Holt v. Pie, 120 Pa. St. 425; Deery v. Cray, 10 Wall. (U. S.) 263; Wilson v. Tucker, 10 R. I. 578; Maxted v. Seymour, 56 Mich. 129.

deed.¹ The same principle is applicable to a deed containing references to maps or plats, which must be consulted and are admissible to ascertain the location of the monuments which constitute the boundaries of the land conveyed.² In the case of documents referred to in wills, which are required to be attested, it has been held that to admit their incorporation in the will they must be referred to *as in existence when the will is executed*,³ and the document may then be shown by parol evidence to be identical with that referred to.⁴

§ 211. Receipts.—“A receipt may be defined as such a written acknowledgment by one person of his having received money or goods from another as will be *prima facie* evidence of that fact in a court of law.”⁵ Parol evidence is generally admissible to explain or vary the meaning or purpose of a simple written receipt.⁶ If the writing, however, constitutes

¹ Tiedeman on R. P., § 841; Whitehead v. Rogers, 106 Mo. 231; Campbell v. Morgan, 68 Hun. 490; Perry v. Binney, 103 Mass. 153; Vance v. Fare, 24 Cal. 444; Overend v. Menezzer, 83 Tex. 152; McAfee v. Arline, 83 Ga. 645; Knight v. Dyer, 57 Me. 176; Lippitt v. Kelly, 46 Vt. 523; Rupert v. Penner, 35 Neb. 587. The deed referred to need not be recorded. Simmons v. Johnson, 14 Wis. 526; Caldwell v. Center, 30 Cal. 543.

² Tiedeman on R. P., § 841; Chamberlain v. Bradley, 101 Mass. 191; St. Louis v. Miss. P. R. Co. (Mo., 1893), 21 S. W. Rep. 202; Fox v. Union Co., 109 Mass. 292; Bohier v. Lange, 44 Minn. 281; Redd v. Murry, 24 Pac. Rep. 341; 93 Cal. 48; Whitehead v. Ragan, 106 Mo. 231; Birmingham v. Anderson, 48 Pa. St. 253; Plummer v. Gould, 92 Mich. 1; Spiller v. Scribner, 36 Vt. 247; Chapman v. Polack, 70 Cal. 487; Frost v. Cattle Co., 81 Tex. 505.

³ Newton v. Seamen's Fr. Soc., 130 Mass. 91; Brown v. Clark, 77 N. Y. 360; Baker's Appeal, 107 Pa. St. 381;

Tonnele, etc. v. Hall, 4 Comst. 145; In re Soher, 78 Cal. 477; Chambers v. McDaniel, 3 Rich. Eq. 305; Harvey v. Chouteau, 14 Mo. 587; Johnson v. Clarkson, 3 Rich. Eq. 305; Thayer v. Wellington, 9 Allen, 283; In re Lambert's Estate, 10 Pa. Co. Ct. R. 10; In re Sunderland, 1 P. & D. 198; Allen v. Maddock, 11 Moore P. C. 427, 454; Von Stanbenzee v. Monck, 32 L. J. Prob. 21; In re Barber, W. N. 1879, p. 141.

⁴ Pollock v. Glassell, 2 Gratt. 439; Barley v. Barley, 7 Jones, 44; Zimmerman v. Zimmerman, 23 Pa. St. 375; Crosby v. Mason, 32 Conn. 482; Fesler v. Simpson, 58 Ind. 83.

⁵ Grimke, J., in Kegg v. State, 7 Ohio St. 79. As to the conclusiveness of receipts *per se* as evidence, see State v. Branch, 112 Mo. 661.

⁶ Schwersenski v. Vineberg, 19 Can. S. C. R. 243; Osborn v. Stringham (S. D., 1894), 57 N. W. Rep. 776; Oakley v. State, 40 Ala. 392; Hancock v. Moody, 39 Ill. App. 17; State v. McDonald, 43 N. J. L. 591; Buswell v. Pioneer, 37 N. Y. 312; Fire Ass'n v. Wickham, 141 U. S. 564;

or contains a complete contract, as when it contains stipulations prescribing how the money is to be expended, parol evidence is inadmissible to vary its terms, so far as it is a contract,¹ though it may assume the form of a receipt.²

§ 212. Independent parol contracts and conditions precedent.—These generally may be shown by parol when contemporaneous and consistent with the writing, and founded on a distinct consideration,³ or when the consideration of the oral collateral contract is the performance of the written one.⁴

Richardson v. Beede, 43 Me. 161; Lane v. Johnson, 59 Vt. 237; Hill v. Durand, 53 Wis. 160; Prairie Sch. Twp. v. Haselen (N. D., 1893), 55 N. W. Rep. 938; Bell v. Utley, 17 Mich. 508; Chapman v. Sutton, 68 Wis. 657; Catoe v. Catoe, 32 S. C. 595; Lowe v. Thompson, 86 Ind. 503; Texas M. L. Ins. Co. v. Davidge, 51 Tex. 244; McKinnie v. Harvey, 38 Minn. 18; Dunn v. Pipes, 20 La. Ann. 276; Badger v. Jones, 12 Pick. (Mass.) 371; McFadden v. Railway Co., 92 Mo. 343; Chapin v. Chicago, etc. Co. (Iowa, 1890), 44 N. W. Rep. 820; Marse v. Rice (Neb., 1893), 54 N. W. Rep. 308; Dunagan v. Dunagan, 38 Ga. 554; Calhoun v. Richardson, 30 Conn. 210; Knox v. Barbee, 3 Bibb (Ky.), 526; Edgerly v. Emerson, 23 N. H. 555. Whether the receipt is an official acknowledgment or a receipt under seal, as in a deed of conveyance, is immaterial. Brown v. Cabalin, 3 Oreg. 45.

¹Smith v. Holland, 61 N. Y. 635.

²Fossack v. Moody, 39 Ill. App. 17; Thompson v. Williams, 30 Kan. 114; Carpenter v. Jamieson, 75 Mo. 285; Alcorn v. Morgan, 77 Ind. 184; Tarbell v. Farmers' Mut. El. Co., 44 Minn. 471; Goodwin v. Goodwin, 59 N. H. 548; Van Etten v. Newton, 8 N. Y. S. 478; Young v. Cook, 15 La. Ann. 126; James v. Bligh, 11 Allen (Mass.), 4; Fowler v. Richardson, 32

Ill. App. 252; Harrison v. Bank, 17 Wis. 340; Wood v. Whiting, 21 Barb. 190; Egleston v. Knickerbocker, 6 Barb. 458; Graves v. Dudley, 20 N. Y. 76; Querry v. White, 1 Bibb (Ky.), 271; Sessions v. Gilbert, 1 Vt. 75. Thus, for example, a receipt for goods on storage or deposited as collateral for a loan, constituting a contract of bailment, cannot be varied by parol. Wadsworth v. Alcott, 6 N. Y. 64; Stapleton v. King, 33 Iowa, 28.

³Michigan M. L. Ins. Co. v. Williams, 155 Pa. St. 405; Bagley & Sewall Co. v. Saranac R. P. Co., 135 N. Y. 626; Guidery v. Green, 95 Cal. 630; Babcock v. Deford, 14 Kan. 408; Whitney v. Shippen, 89 Pa. St. 22; Andrews v. Brewster, 124 N. Y. 433; Buzzell v. Willard, 44 Vt. 44; Lamphire v. Slaughter, 61 How. Pr. (N. Y.) 36; Snow v. Allen, 151 Mass. 51. This exception is thus stated by Sir James Stephen: "The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be shown, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." See Dig. Ev., art. 90.

⁴Kelly v. Carter, 55 Ark. 112.

Thus, a verbal warranty in connection with a sale in writing;¹ an agreement to pay a commission for procuring a sale of land,² or for obtaining a charter for a vessel;³ or a condition that a written agreement shall not go into effect unless a certain event shall happen,⁴ or that a policy taken in a party's name was only a security for a debt;⁵ a verbal contract to rebuild in connection with a written lease;⁶ an agreement that a mortgagor may continue in possession under a chattel mortgage,⁷ or an agreement by the obligee in a deed to receive in payment a note of a third party,⁸ or an agreement by a grantor to grade a street,⁹ may all be shown by parol where such independent oral contract does not contradict the language of the written agreement. But where the effect of the collateral parol agreement is to make an entirely new contract out of the written contract, parol evidence is not admissible.¹⁰ But a contemporaneous independent parol contract, the performance of which is a condition precedent to the creation of a binding obligation under a written agreement, may be shown.¹¹

¹ Collette v. Weed, 68 Wis. 428.

² Huckabee v. Shepherd, 75 Ala. 342.

³ Weber v. Kingsland, 8 Bosw. 415.

⁴ Humphreys v. Railroad Co., 88 Va. 431.

⁵ Zabel v. Nyenhuis, 83 Iowa, 750.

⁶ Cumming v. Barber, 99 N. C. 332.

⁷ Pierce v. Stevens, 30 Me. 184.

⁸ Murchie v. Cook, 1 Ala. 41.

⁹ Durkin v. Cobleigh, 30 N. E. Rep. 474.

¹⁰ Miller Ins. Co. v. Kinneard, 35 Ill. App. 105; Blair v. Buttolph, 72 Iowa, 31; Timms v. Sherman, 19 Md. 296; Keeley v. Oliver (N. C., 1893), 18 S. E. Rep. 698; Hubbard v. Greeley, 84 Me. 340; Gerard v. Cowperthwait, 21 N. Y. S. 1092; Lathrop v. Foster, 51 Me. 387; Still v. Tompkins, 154 Pa. St. 43; Richards v. Day, 63 Hun, 635; Haworth v. Norris, 28 Fla. 763; Frost v. Blanchard, 97 Mass. 155; Woodward v. Foster, 18 N. Y. S. 827; McLeod v. Skiles,

81 Mo. 595; Trent v. Fletcher, 100 Ind. 105; Bishop v. Dillard, 49 Ark. 285; Barclay v. Pursley, 110 Pa. St.

13. So oral evidence will not be received to attach a condition to an absolute promise to pay in writing. Allen v. Furbish, 4 Gray, 504; Billings v. Billings, 10 Cush. 178, 182; Ridgway v. Bowman, 7 Cush. 268.

¹¹ Corn v. Rosenthal (N. Y., 1893), 1 Misc. Rep. 168; Black v. Shreve, 13 N. J. Eq. 455; Badcock v. Steadman, 1 Root (Conn.), 87; Humphreys v. Railroad Co., 13 S. E. Rep. 985; Benton v. Martin, 52 N. Y. 570; Juillard v. Chaffee, 92 N. Y. 535; Michels v. Olmstead, 14 Fed. Rep. 219; Pierce v. Tedwell, 81 Ala. 299; Jordan v. Loftin, 13 Ala. 547; Minchin v. Minchin (Mass., 1893), 32 N. E. Rep. 164; Watkins v. Bowers, 119 Mass. 383; Wilson v. Powers, 131 id. 539; Westman v. Krumweide, 30 Minn. 313; Sweet v. Stevens, 7 R. I. 375; Cuthrell v. Cuthrell, 101 Ind. 375; Robinson v. Evans, 3 S. C. 335;

§ 213. To establish implied, resulting or constructive trust.—By statute it is a universal rule that express trusts in real property must be evidenced by some writing,¹ though it should not be understood that the trust must be created by a written instrument. The writing is only needed for its proof, and is regarded simply as an admission of its existence. Parol evidence will not be received to supply what has been omitted from the writing. This rule, however, applies only to express trusts. Implied, constructive and resulting trusts in real property may be created by parol.² So where a deed is absolute upon its face, parol evidence is admissible, though it should be clear and satisfactory,³ to show that the consideration was paid by a person other than the grantee, and to establish a resulting trust in favor of the party paying the consideration.⁴ But a grantor in an absolute deed will not be permitted to show that a trust was intended in his favor, though a third party paying the consideration may do so.⁵

§ 214. Discharge, modification or extension of contract may be shown.—A writing under seal cannot be discharged or satisfied by an instrument of an inferior character.⁶ But a simple contract may be orally rescinded or dissolved if no breach of its conditions has occurred, and this oral discharge or rescission may be shown by extrinsic evidence,⁷ even where

Wendlinger v. Smith, 75 Va. 309. But the evidence of such parol agreement must be clear, precise and satisfactory. Thomas v. Loose, 114 Pa. St. 45; 114 id. 170; Cake v. Potts Bank, 116 id. 270.

¹ See *post*, § 264.

² Tiedeman on Equity, §§ 308–312, and *post*, § 264.

³ Green v. Dietrich, 114 Ill. 636; Woodward v. Sibert, 82 Va. 441; Catoe v. Catoe, 32 S. C. 595; 10 S. E. Rep. 1078; Hoover v. Hoover, 129 Pa. St. 201.

⁴ Borst v. Nalle, 28 Gratt. (Va.) 423; Von Trotha v. Bamberger, 15 Colo. 1; Leakey v. Gunter, 25 Tex. 400; Hudson v. White, 17 R. I. 519; Larman v. Knight, 140 Ill. 132; Rank v. Grote, 110 N. Y. 12; Brison

v. Brison, 75 Cal. 525. In a few cases parol evidence has been admitted to establish an active resulting trust. Barker v. Prentiss, 6 Mass. 430; Brown v. Isbell, 11 Ala. 1009.

⁵ Lawson v. Lawson, 117 Ill. 98; Gerry v. Stimpson, 60 Me. 186; Whyte v. Arthur, 17 N. J. Eq. 521.

⁶ As to what constitutes a seal and its necessity, see Tiedeman on R. P., § 808, where the authorities are fully cited; 2 Bl. Com. 305–6.

⁷ Brownfield's Ex'r v. Brownfield, 151 Pa. St. 565; Whitcher v. Shattuck, 3 Allen (Mass.), 545; Marsh v. Bellew, 45 Wis. 39; Davis v. Goodrich, 45 Vt. 36; Page v. Einstein, 7 Jones (N. C.), 147; Tucker v. Tucker (Ind., 1887), 13 N. E. Rep. 710; Estes v. Fry, 94 Mo. 266; Sessions v. Peay,

a writing is by the statute of frauds made essential to the validity of the original agreement.¹ Not only may the express annulment or abandonment of a written contract be thus orally shown, but a subsequent oral contract founded on a fresh consideration, operating either as a modification or limitation of the former written contract or as a substitute for it, may be shown by parol.² Under this rule parol evidence has been received to show that the parties have consented to a change in the time, place and manner of performance; that a new or different consideration has been agreed upon, and that the promisor has agreed to do something wholly different from what was mentioned in the writing.³ If a written contract has been lost its contents may be proved by parol when a new and different parol contract has been made in its place.⁴ An oral extension of the time of performance made prior to a breach of the contract may be shown, and it is immaterial whether the writing was sealed⁵ or not, or whether it was a contract within the statute of frauds.⁶ But oral evidence is never admissible to show a subsequent material verbal modification of the terms of any agreement which under the stat-

21 Ark. 400; *Harrington v. Samples*. 36 Minn. 200; *Arnold v. Arnold*, 20 Iowa, 273; *Medomack v. Curtis*, 24 Me. 36; *Fowler v. Smith*, 153 Pa. St. 639 (satisfaction of judgment).

¹ *Buell v. Miller* 4 N. H. 196; *Cummings v. Arnold*, 3 Metc. 486; *Vanderlin v. Hovis*, 152 Pa. St. 11.

² *Frick v. Mill Co.* (Kan., 1893), 32 Pac. Rep. 1103; *Richardson v. Hooper*, 13 Pick. 446; *Delacroix v. Bulkley*, 13 Wend. 71; *Nashua, etc. Co. v. Boston, etc. Corp.*, 31 N. E. Rep. 1060 (Mass., 1893); *Munroe v. Perkins*, 9 Pick. 298; *Raymond v. Krauskopf* (Iowa, 1893), 54 N. W. Rep. 432; *Vanderlin v. Hovis*, 152 Pa. St. 11; *Strauss v. Gross* (Tex., 1893), 21 S. W. Rep. 305; *Stallings v. Gottschalk* (Md., 1893), 26 Atl. Rep. 524; *Janney v. Brown*, 36 La. Ann. 118; *Piatt v. United States*, 22 Wall. 496; *Creamer v. Stevenson*, 15 Md. 111;

Cobb v. O'Neal, 2 Sneed (Tenn.), 438; *Holloway v. Frick* (Pa., 1893), 24 Atl. Rep. 201; *Worrell v. Forsyth* (Ill., 1892), 30 N. E. Rep. 673; *Flanders v. Fay*, 40 Vt. 316; *Thompson v. Locke*, 65 Iowa, 429; *Bannon v. Aultman*, 80 Wis. 307; *Cartwright v. Clopton*, 25 Ga. 85.

³ *Shapt v. Wyckoff*, 39 N. J. Eq. 376; *Mead v. Parker*, 111 N. Y. 259; *Walker v. Camp*, 63 Iowa, 627; *Cummings v. Putnam*, 19 N. H. 569; *Danforth v. McIntire*, 11 Ill. App. 417, and cases *supra*.

⁴ *Walker v. B. Wilmington, etc. Co.*, 26 S. C. 80.

⁵ *Branch v. Wilson*, 12 Fla. 543.

⁶ *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Mead v. Parker*, 111 N. Y. 259; *Grace v. Lynch*, 80 Wis. 166; *Bigelow v. Capen*, 145 Mass. 273 (renewal of note).

ute of frauds is required to be in writing, as a new verbal contract under such conditions would be inoperative.¹ The date of the execution of an instrument when inserted in the writing is always open to explanation, unless the date of execution is an essential element of the contract itself, when to show a different date would be to make a new parol contract for the parties.² The date as given is presumed to be correct³ until the contrary is shown.⁴ So, too, a date which has been omitted may be supplied by parol.⁵

§ 215. **To rebut presumptions.**—If a presumption of law is customarily drawn from certain language employed in a written instrument, parol evidence is admissible to rebut this presumption by showing that in this particular instance the intention of the party was that the usual inference should not follow. So it is presumed where two legacies of the same amount are bequeathed to one person for the same purpose that the testator does not intend that they shall be cumulative. Under such circumstances parol evidence is admissible, not to vary the will, but to show that the testator intended that the earlier legacy should not be satisfied by the later, and that the beneficiary should take both. In other words, extrinsic evidence is admitted to show that the will as it stands speaks the true intent of the testator.⁶ So parol evidence is admissible to rebut a resulting trust which arises in favor of the heirs of the testator, on the failure or lapse of a devise,⁷ and to

¹ Dana v. Hancock, 30 Vt. 616; Low v. Treadwell, 12 Me. 441; Hill v. Blake, 97 N. Y. 216; Whittier v. Dana, 10 Allen, 326; Jamison v. Ludlow, 3 La. Ann. 492; Adler v. Friedman, 16 Cal. 138; Marsh v. Bel-
lew, 41 Wis. 39; Hill v. Blake, 97 N. Y. 216. Thus, parol evidence of a general warranty is not admissible to vary the terms of a deed containing a limited warranty only. Raymond v. Raymond, 10 Cush. (Mass.) 134.

² Draper v. Snow, 20 N. Y. 331; Ellis v. Bank, 7 How. (U. S.) 294; Barlow v. Buckingham, 68 Iowa, 169.

³ Cowing v. Altman, 71 N. Y. 433.

⁴ Foster v. Beals, 21 N. Y. 247; St.

John v. Am. Mut. L. Ins. Co., 2 Duer (N. Y.), 415.

⁵ Burditt v. Hunt, 25 Me. 419.

⁶ Clendenning v. Clymer, 17 Ind. 155; Paine v. Parsons, 14 Pick. 313; Dewitt v. Yates, 10 Johns. 156; Cecil v. Cecil, 20 Md. 153; Hine v. Hine, 39 Barb. 507; Russell v. Stanbyn, 16 Moak's Eng. 818; Sims v. Sims, 2 Stockton Ch. 152; Jones v. Mason, 5 Rand. (Va.) 577; Timberlake v. Parish, 5 Dana, 346.

⁷ McCure v. Evans, 29 Beav. 422; Powell v. Manson, 3 Mason, 347; Stark v. Canady, 3 Litt. 399; Mann v. Mann, 14 Johns. 1; Reynolds v. Robinson, 82 N. Y. 103; Sture v. Sture, 5 Johns. Ch. 1.

show that a legacy by a parent to a child is not in satisfaction of a portion due him.¹ Where a parent or other person standing *in loco parentis* makes a pecuniary provision for a child either in land or money, which is not made for the purpose of providing for the education of the latter or which is not a mere gift to him, the law will presume that it was intended as an advancement *pro tanto* of what the child would take on the death of the person either by the statutes of descent or distribution or by devise from the latter. If the advancement is to be deducted from a devise by will, then parol evidence is admissible, including the declarations of the testator, to rebut the presumption that the gift was an advancement and that the devise is thereby satisfied.² If, on the other hand, the person *in loco parentis* dies intestate, parol evidence may be received to rebut this presumption where the gift or advancement consisted of land the transfer of which is evidenced by a writing,³ or where a note or other evidence of indebtedness is given by the child to the parent,⁴ or where the advancement to the child is entered in the books of the parent in the form of a charge against the former. The presumption of delivery⁵ by the grantor or of acceptance by the grantee⁶ which arises when a properly executed deed is found in the latter's possession may be rebutted by parol evidence that the deed was not intended to be delivered or that the grantee was ignorant of the conveyance.⁷

¹ *Smith v. Condor*, 9 Ch. D. 170; *Lamb*, 12 N. J. Eq. 116; *Little v. Lacon v. Lacon*, W. N. 1891, p. 25; *Gilson*, 39 N. H. 505; *Morris v. Henderson*, 37 Miss. 501; *Faulkner v. May*, 28 Ala. 141; *Rogers v. French*, 19 Ga. 316; *Nolan v. Bolton*, 25 id. 352; *Langdon v. Astor*, 16 N. Y. 34; *Richard v. Humphreys*, 15 Pick. 139; *Miner v. Atherton*, 35 Pa. St. 528.

² See cases in last note.

³ *Phillips v. Chappell*, 16 Ga. 16; *Sayles v. Baker*, 5 R. I. 457; *Miller's Appeal*, 31 Pa. St. 337; *Scott v. Scott*, 1 Mass. 527.

⁴ *Tillotson v. Race*, 22 N. Y. 127.

⁵ *Tiedeman on R. P.*, § 812; *Adams v. Frye*, 5 Metc. 109; *Roberts v. Jackson*, 1 Wend. 478; *Black v.*

Peavey v. Tilton, 18 N. H. 152; *Tompkins v. Wheeler*, 16 Pet. 119; *Fonda v. Sage*, 46 Barb. 109; *St. Louis, etc. Co. v. Ruddell* (Ark., 1890), 13 S. W. Rep. 418; *Dikeman v. Arnold*, 78 Mich. 455; 44 N. W. Rep. 407.

⁷ See *Tiedeman on Real Property*, §§ 812, 813.

§ 216. To show usage.—The general and uniform doing of a certain act is denominated usage. Though the word is sometimes employed as synonymous with “custom,” a distinction in meaning may be noted. “Usage is the fact; custom the law. There may be usage without custom; there can be no custom without usage to precede it. Usage consists in a repetition of acts; custom arises out of this repetition.”¹ Well-recognized, long-established usages and customs prevalent in the locality where a contract is made or a will or deed executed are presumed to be known to the parties and to be present in their minds when the instrument is executed.² Where no express direction to the contrary exists, parol evidence of usage is admissible to ascertain the intention of the parties or explain the nature and subject-matter of the instrument or the meaning of its terms, wherever ambiguity or obscurity exists upon these subjects.³ On the other hand, where the language is clear and free from doubt, and no ambiguity or uncertainty is found, parol evidence of custom is not to be received to control or vary the stipulations of the instrument.⁴

¹ *Cutter v. Waddingham*, 22 Mo. 284; *Power v. Bowdle* (N. D., 1893), 54 N. W. Rep. 410, citing *Wharton on Evid.*, 410.

² *Howard v. Walker* (Tenn., 1893), 21 S. W. Rep. 897; *Austrian v. Springer*, 94 Mich. 343; *Pennell v. Delta Co.*, 94 Mich. 247; *McManus v. London* (Minn., 1893), 55 N. W. Rep. 139; *McCullough v. Ashbridge*, 155 Pa. St. 166. In the case of a particular custom not of general observance and notoriety, actual knowledge must be brought home to the parties. *Milw. etc. Co. v. Johnson*, 35 Neb. 554.

³ *Brown v. Baldwin Co.*, 13 N. Y. S. 893; *McClusky v. Klosterman*, 20 Oreg. 108; 25 Pac. Rep. 366; *Atkinson v. Truesdell*, 127 N. Y. 230; 27 N. E. Rep. 844; *Long v. Armsby Co.*, 43 Mo. App. 253; *Thompson v. Brannin* (Ky., 1893), 21 S. W. Rep. 1057; *Pucci v. Barney*, 21 N. Y. S. 1099; *Destrehan v. Louisiana Cypress Co.*

(La., 1893), 13 S. Rep. 230; *Merchant v. Howell* (Minn., 1893), 55 N. W. Rep. 131; *Kansas City, etc. Co. v. Webb* (Ala., 1893), 11 S. Rep. 888; *Harrell v. Zimpleman*, 66 Tex. 292; *Sahlien v. Bank*, 90 Tenn. 221. See also, *Tiedeman on R. P.*, § 611. “A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning are clear, evidence of usage to the contrary is irrelevant. Usage cannot make a contract where there is none.” *First Nat. Bank v. Burkhardt*, 100 U. S. 692. The custom need not be pleaded. *Breen v. Moran*, 53 N. W. Rep. 755.

⁴ *The Reeside*, 2 Summ. 567; *Cook v. Hawkins*, 16 S. W. Rep. 8; 54 Ark. 423; *Van Camp v. Hartman*, 126 Ind. 177; *Larrowe v. Lewis*, 58 Hun. 601; *De Cemea v. Cornell*, 20 N. Y. S. 895;

But a custom must be generally known and uniformly and continuously observed where the contract is made, or in the profession or trade to which the parties belong; for if it be confined to a limited class of persons, it is not presumptively binding, and parol evidence of its existence is inadmissible.¹ The courts have adverted to the danger of allowing the introduction of parol evidence of custom to modify or limit the general application of the common law and the law merchant to the liabilities and obligations of parties. The present trend of the cases is perhaps restrictive in this respect; and while evidence of general and notorious customs is always admissible to explain a writing, evidence of customs which are limited in their operations should only be received after it is shown that the parties contracted with express reference thereto.² So, though parol evidence of general usage is admissible whether the instrument under consideration be a corporate charter, or other statute or deed or simple contract,³ yet proof of custom will not be admissible to enlarge the statutory authority of officials,⁴ or to establish a different rule of law from that laid down by a statute.⁵

1 Misc. Rep. 399; *Dobson v. Kuhula*, 66 Hun, 627; *Iasigi v. Rosenstein*, 65 id. 591; *Simis v. Railway Co.*, 20 N. Y. S. 179; *Gilbert v. McGinnis*, 114 Ill. 48; *Newhall v. Appleton*, 114 N. Y. 143; *De Witt v. Berry*, 134 U. S. 314; *Emery v. Bos. Marine Ins. Co.*, 138 Mass. 398; *Bigelow v. Legg*, 102 N. Y. 654.

¹ *Pennell v. Delta Co.*, 94 Mich. 247; *Martin v. Ashland Mill Co.*, 49 Mo. —; *Larson v. Johnson*, 42 Ill. App. 198; *Greenwich Ins. Co. v. Waterman*, 54 Fed. Rep. 839; *McCullough v. Ashbridge*, 155 Pa. St. 166; *Oregon Short, etc. Co. v. N. P. Ry. Co.*, 51 Fed. Rep. 465; *McKeefrey v. Connellsville Coke Co.*, 56 Fed. Rep. 470; *Dobson v. Kuhula*, 66 Hun, 627; *Bardwell v. Ziegler*, 3 Wash. St. 34; *Chateaugay, etc. Co. v. Blake*, 144 U. S. 476. The custom need not be co-extensive with the state. *Lane v. Union Bank*, 29 N. E. Rep. 613.

² See remarks of Justice Story in *Schooner Reeside*, 2 Sumn. 567; *Nordans v. Hubbard*, 48 Fed. Rep. 921.

³ *Farrar v. Stackpole*, 6 Greenl. 154; *Meriam v. Harsen*, 2 Barb. 232.

⁴ *Walters v. Senf* (Mo., 1893), 22 S. W. Rep. 311.

⁵ *Gore v. Lewis*, 109 N. C. 539; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74. The evidence of a single witness is, if unimpeached, sufficient to prove usage. *Miller v. Insurance Co.*, 1 Abb. N. C. 470; *Vail v. Rice*, 5 N. Y. 155; *Robinson v. United States*, 13 Wall. 363. See, also, *Abbott's Brief on Facts*, §§ 727-735. He need not be an expert if he knows the usage. *Griffin v. Rice*, 1 Hilt. (N. Y.) 184. But his testimony to specific acts is incompetent as proof of a usage. *Springfield v. Vivian*, 63 Mich. 681; *Abbott, Brief on Facts*, § 732.

§ 217. **Technical terms.**—Where language has an accepted popular,¹ commercial or scientific meaning,² the court will take notice of its significance and will not receive evidence to affix a different meaning,³ upon the presumption that the parties employed the words in their accustomed sense.⁴ But where commercial or scientific terms which are peculiarly technical are used, or where ordinary words are used in a technical sense, *i. e.*, a sense peculiar to a particular locality or trade, a latent ambiguity arises where these words are viewed in relation to the subject-matter or to extrinsic circumstances, and, under such circumstances, where their meaning is not clear, parol evidence is always admissible.⁵ But the witness

¹ *Kemble v. Lull*, 3 McLean, 272; *Sexton v. Windell*, 23 Gratt. 534; *Brawley v. United States*, 96 U. S. 168; *Bradish v. Yocum*, 130 Ill. 386.

² *Hartman v. Camman*, 10 N. J. Eq. 128.

³ "When parties engaged in a particular business use terms which have acquired a well-defined meaning in that business, the supposition is that they intended the terms to have their ordinary technical meaning." *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 256; *Chilberg v. Jones*, 3 Wash. St. 530; *Cole v. Lake*, 54 N. H. 278; *Caldwell v. Fulton*, 31 Pa. St. 849; *Cross v. Thompson*, 50 Kan. 627; *Gardt v. Brown*, 113 Ill. 475; *Holcomb v. Mooney*, 13 Oreg. 513; *Bradish v. Yocum*, 130 Ill. 386; *Van Fleet v. Sledge*, 45 Fed. Rep. 743; *Matley v. Long*, 71 Md. 585; *Lippett v. Kelly*, 46 Vt. 516; *Fruin v. Railroad*, 89 Mo. 397; *Insurance Co. v. Throop*, 22 Mich. 146; *Willmering v. McGauhey*, 30 Iowa, 205.

⁴ So parol evidence to explain well-known words, as "lower" and "south" (*Farley v. Deslonde*, 69 Tex. 458), "breeder and foal-getter" (*Cross v. Thompson*, *supra*), "present and future" (*Swain v. Grangers' Union*, 69 Cal. 176), "more or less"

(*Shickle v. Chouteau Ry.*, 84 Mo. 161) "payment" (*Van Fleet v. Sledge*, 45 Fed. Rep. 743), "a reasonable time" (*Jenkins v. Lykes*, 19 Fla. 148), "timber" (*Pillsbury v. Locke*, 33 N. H. 96), "lumber" (*Williams v. Stevens*, 72 Wis. 487), "store goods" (*Taylor v. Sayre*, 4 Zab. 647), will be rejected.

⁵ *Bryan v. Harrison*, 76 N. C. 360; *Silberman v. Clark*, 96 N. Y. 524; *Clark v. Coffin Co.*, 125 Ind. 277; *Hall v. Davis*, 36 N. H. 569; *Charles v. Patch*, 87 Mo. 450; *Mack v. Bensley*, 63 Wis. 80; *Estman v. St. Anthony, etc. Co.*, 43 Minn. 60; 44 N. W. Rep. 883; *Highton v. Dessau*, 19 N. Y. S. 395; *Putnam v. Bond*, 100 Mass. 58; *Wabash, etc. Co. v. McDougal*, 113 Ill. 603; *Atlanta v. Schmelzer*, 89 Ga. 609; *Westmoreland v. Carson*, 76 Tex. 619; *Bollinger Co. v. McDowell*, 99 Mo. 632. So parol evidence has been received to explain the meaning of such terms as "fur" (*Astor v. Insurance Co.*, 7 Cow. 202), "barrel" (*Miller v. Stevens*, 100 Mass. 518), "terms, two months" (*Hurd v. Bovee*, 134 N. Y. 596; 31 N. E. Rep. 624), "mason work" (*Highton v. Dessau*, 19 N. Y. S. 395), "horn chains" (*Swett v. Shumway*, 102 Mass. 365), "head-right" (*Minor v. Powers* (Tex. Civ.

who is called to explain the meaning of the terms should be confined to his legitimate office and should not be allowed to affix a construction to the instrument.¹

§ 218. **Abbreviations.**—These may, where they occur in writing, be explained by parol evidence² of usage, if consistent with the language of the contract,³ though if they have acquired a recognized legal or popular meaning parol evidence to show they are used in another sense will be rejected.⁴ The letters "I. O. U." constitute a valid acknowledgment of a debt due,⁵ and a written "I. O. U." is presumptive evidence of an account stated.⁶ The meaning of the letters "C." and "J. P." after the signatures on a writ may be explained by parol as meaning "constable" and "justice of the peace."⁷

App., 1894), 24 S. W. Rep. 710), "homestead farm" (Locke v. Rowell, 47 N. H. 46), "on margin" (Hatch v. Douglas, 48 Conn. 116), "unsettled" (Auzeriaz v. Neglee, 74 Cal. 60), "equal to Corliss" (Wickes v. Swift Co., 70 Mich. 322), "product" (Stewart v. Smith, 23 Ill. 397), "regular turn of loading" (Leideman v. Schultz, 24 Eng. L. & Eq. 305), "care of R. R. Ag't" (Sav., etc. Co. v. Collins, 77 Ga. 376), "season" (Wachterhaus v. Smith, 10 N. Y. S. 535), "crop of flax" (5 Lans. (N. Y.) 230), "cold storage" (Behrman v. Lind, 47 Hun. 530), "payable in trade" (Dudley v. Vose, 114 Mass. 34), "spitting of blood" (Singleton v. St. Louis, etc. Co., 66 Mo. 63), "proposition" (Lamb v. State, 66 Md. 285), "flood-dams cribbed, sparred, etc." (Quigley v. De Hass, 98 Pa. St. 292), "bought 12½, 6 mos." (Dana v. Fiedler, 12 N. Y. 40), "good custom cowhide" (Wait v. Fairbanks, Brayt. (Vt.) 77), "good breeder" (Connable v. Clark, 26 Mo. App. 192), "merchantable hay" (Fitch v. Carpenter, 43 Barb. 40), "advertising chart when published" (Stoops v. Smith, 100 Mass. 63).

¹ Reynolds v. Jordan, 6 Cal. 109;

State v. Lefaivre, 53 Mo. 470; Arthur v. Roberts, 60 Barb. (N. Y.) 580; Reynolds v. Jordan, 6 Cal. 109; Sanford v. Rawlings, 43 Ill. 92.

² Hill v. State, 9 Yerg. (Tenn.) 357; Converse v. Weed (Ill., 1892), 31 N. E. Rep. 314; Jacqua v. Witham, 106 Ind. 545; Griffin v. Salmon, 6 Daly, 531; Sheldon v. Benham, 4 Hill (N. Y.), 129; Damm v. Gow, 88 Mich. 99; Taylor v. Beavers, 4 E. D. Smith, 215; Collender v. Dinsmore, 55 N. Y. 200. In wills, Chambers v. Watson, 60 Iowa, 339; Goblet v. Beechy, 3 Sim. 24; Norman v. Morrell, 4 Ves. 769; Clayton v. Nugent, 13 M. & W. 206; Kell v. Charmer, 23 Beav. 195; Barton v. Anderson, 104 Ind. 578; Smith v. Insurance Co., 89 Pa. St. 287.

³ Collender v. Dinsmore, 55 N. Y. 202; Dana v. Fiedler, 12 N. Y. 40.

⁴ Silberman v. Clark, 96 N. Y. 522.

⁵ Kinney v. Flynn, 2 R. I. 319.

⁶ Fesenmyer v. Adcock, 16 M. & W. 449; Curtis v. Richards, 1 Scott N. R. 155; Gould v. Combs, 1 C. B. 543.

⁷ Davis v. Harnbell (Tex., 1894), 24 S. W. Rep. 972. "In declaring on an instrument containing abbreviated terms, extrinsic averments may

§ 219. **The relations of the parties.**—Parol evidence is inadmissible to show that a person who signs as principal was an agent,¹ or that one who signs as indorser was a surety.² But parol evidence is often admissible to identify the parties,³ or to show the relations of the parties, as that a person who signed a note as payee did so as a surety,⁴ or in his representative capacity,⁵ or that an indorser is not the assignee but the payee of a note,⁶ or that a person who writes his name on the back of a note did so as a witness and not as an indorser.⁷

§ 220. **To ascertain or explain subject-matter.**—The term “subject,” as here used, may be defined as the persons or things to which the writing relates. Parol evidence will be admitted to identify or ascertain the subject of the instrument or to explain its nature when, from the circumstances of the case, no light is obtainable from a careful consideration of the context.⁸ Thus, where property, whether real or personal,

be used to make them intelligible; and evidence of the sense in which the parties were in the habit of using the abbreviations and of their conventional meaning is admissible, but not to show the intention of one party in using them. Generally, in indictments, common words are to be used. Abbreviations of terms employed by men of science or in the arts will not answer without full explanation of their meaning in common language. The use of ‘A. D.’ because of its universality, constitutes an exception. Arabic figures and Roman letters have also become indicative of numbers as fully as words. Their general use makes them known to all. But unexplained initials, referring to public land surveys, etc., may not be employed in an indictment.” *Jacqua v. Witham & Co.*, 106 Ind. 547–48.

¹ *Steirle v. Kaiser*, 12 S. Rep. 839; *Hunt v. Adams*, 7 Mass. 518; *Cream City G. Co. v. Friedlander*, 54 N. W. Rep. 28.

² *Riley v. Gerrish*, 9 Cush. 104.

³ *Parsons v. Thornton*, 82 Ala. 308.

⁴ *Riley v. Gregg*, 16 Wis. 666; *Trustees v. Southard*, 31 Ill. App. 359; *Otis v. Storch*, 15 R. I. 41; *Bradley v. Caswell* (Vt., 1893), 26 Atl. Rep. 956.

⁵ *Russell v. Irwin*, 41 Ala. 292; *Northern Bank v. Lewis*, 78 Wis. 475; *Keidom v. Winegar* (Mich., 1893), 54 N. W. Rep. 901.

⁶ *Holmes v. Goldsmith*, 147 U. S. 150.

⁷ *Tombler v. Reitz* (Ind., 1893), 33 N. E. Rep. 789. Parol evidence is not admissible to show that one who indorses “without recourse” is a surety. *Young v. Nelson* (Minn., 1893), 53 N. W. Rep. 629.

⁸ “In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are called the circumstances of the case.” *Stephen’s Dig. of Ev.*, art. 91.

is conveyed, its condition or extent at that time is usually referred to, and any evidence necessary to place the court in the position of the parties themselves in order to ascertain the sense of the words employed is admissible.¹ Where a description is ambiguous parol evidence is admissible to show the extent and character of a grantor's possession.² Thus, where a farm or house is conveyed, parol evidence, while not admissible to vary or contradict the boundaries stated in the deed,³ is admissible to ascertain the identity or the location of the monuments where they are lost or have been moved, or where doubt exists concerning what objects are intended as monuments.⁴

Whenever something extrinsic is referred to as the subject-matter of a writing, as the family or property of a grantor or a testator, evidence of the facts and circumstances is necessary to identify it unless, as rarely happens, the writing itself furnishes a means of identification. Thus, where a testator or grantor refers to his estate in Westchester, or known as B.,

¹ *Schneider v. Patterson* (Neb., 1894), 57 N. W. Rep. 398; *In re Gilmore*, 154 Pa. St. 523; *Mounett v. Mounett*, 46 Ohio St. 30; *Richardson v. Palmer*, 38 N. H. 218; *Hughes v. Wilkinson*, 35 Ala. 453; *Welch v. Edmiston*, 46 Mo. App. 282; *Abbot v. Abbott*, 51 Me. 581; *Peart v. Price*, 152 Pa. St. 277; *Long v. Long*, 44 Mo. App. 141; *Baker v. Hall* (Mass., 1893), 33 N. E. Rep. 612; *Roberts v. Roberts*, 55 N. Y. 275; *Thompson v. Railroad Co.*, 82 Cal. 497; *Clark v. Coffin Co.*, 125 Ind. 277; *Ft. Worth R. R. Co. v. Bank*, 84 Tex. 369; *Perry v. Scott*, 109 N. C. 374; *Paugh v. Paugh*, 40 Ill. App. 143; *Minor v. Powers* (Tex., 1894), 24 S. W. Rep. 710.

² *Bell v. Woodward*, 46 N. H. 327; *Baker v. Hall* (Mass., 1893), 33 N. E. Rep. 612; *Booth v. Palte*, L. R. 15 App. Cas. 188; *Tinsley v. Dowell* (Tex., 1894), 24 S. W. Rep. 928.

³ *Pride v. Lunt*, 19 Me. 115; *Parke v. Kane*, 22 How. 1; *McCoy v.*

Galloway, 3 Ohio. 283; *Thayer v. Finton*, 108 N. Y. 397; *Segar v. Babcock* (R. I., 1893), 26 Atl. Rep. 257; *Drew v. Swift*, 46 N. Y. 209; *Dean v. Frskine*, 18 N. H. 83; *Spiller v. Scribner*, 36 Vt. 247; *Hall v. Eaton*, 139 Mass. 217; *Kernam v. Baham*, 13 S. Rep. 155; *Beardsley v. Crane* (Minn., 1893), 54 N. W. Rep. 740.

⁴ *Waterman v. Johnson*, 13 Pick. 261; *Segar v. Babcock* (R. I., 1893), 26 Atl. Rep. 257; *Beardsley v. Crane* (Minn., 1893), 54 N. W. Rep. 740; *Minor v. Kirkland* (Tex., 1893), 20 S. W. Rep. 932; *Campbell v. Wood* (Mo., 1893), 22 S. W. Rep. 796; *Wead v. Railroad Co.*, 64 Vt. 52; *Sheetz v. Sweeney*, 136 Ill. 336; *Flagg v. Mason* 141 Mass. 64; *Converse v. Lamghshow*, 81 Tex. 275; *Pickett v. Nelson*, 79 Wis. 9; *Rapley v. Klugh* (S. C., 1894), 18 S. E. Rep. 680; *Wells v. Leveridge*, 20 Oreg. 168; *Baldwin v. Shannon*, 43 N. J. L. 96; *Tiedeman on R. P.*, § 832.

or occupied by a certain person, parol evidence is immediately required to show that he owned an estate such as is described.¹ Again, suppose the testator bequeathes his "money" or "household furniture," or all "his property" or "estate," using words which have a common and well-recognized meaning in a peculiar, vague and confusing manner. No ambiguity, latent or patent, can be said to exist until evidence has been received which would tend to ascertain or identify the subject-matter. For the words, while not technical or unusual, are employed by the writer in a general and vague sense, and the meaning which he wishes to convey cannot possibly be apprehended on an inspection of the instrument alone. If extrinsic evidence were not receivable in such a case, the intention of the person executing the instrument could not be effectuated.² In such cases of doubt and uncertainty, "when the language in its primary meaning is insensible with reference to extrinsic circumstances,"³ extrinsic evidence is admissible of all facts and circumstances appertaining to the persons or things which are mentioned that will make the intention of the testator more clearly appear. But the rule should not be carried too far. Thus, in the case of wills or other transactions which the law requires to be in writing, parol evidence of the declarations of the intention of the testator either prior or subsequent to or contemporaneous with the execution of the instrument is not admissible, unless in the case of a latent ambiguity arising from the fact that there are two or more persons or things answering substantially to the description of the writing.⁴

¹ Mead v. Parker, 115 Mass. 413; Aldrich v. Aldrich, 135 Mass. 153; ham v. Gannett, 124 Mass. 151; Raymond v. Coffey, 5 Oreg. 132.

² Where a testator devises the house he lives in, parol evidence is admissible to identify it. Beham v. Hendrickson, 32 N. J. Eq. 441; Chambers v. Watson, 60 Iowa, 339. ³ Taylor, Ev., § 1109; Wigram on Wills, 67-70.

⁴ Mosely v. Martin, 37 Ala. 216; Morse v. Stearns, 131 Mass. 389; Lovejoy v. Lovett, 124 id. 270; Hall v. Davis, 36 N. H. 569; Morgan v. Burrows, 45 Wis. 211; Mitnacht v.

§ 221. **Ambiguities defined and distinguished — Parol evidence to explain.**— An ambiguity in a written instrument is any indistinctness, duplicity or uncertainty of meaning arising from the words having no definite sense or a double meaning.¹ A writing is not ambiguous merely because the court cannot understand its meaning on account of the technical language in which it is couched.² So language may be inaccurate without being ambiguous, and ambiguous though strictly accurate. So where by rejecting that portion of a description which is inaccurate as surplusage the intention of the writer can be ascertained, no ambiguity can be said to exist.³ On the other hand, the words “indistinctness,” “uncertainty” and “obscurity” are much broader in meaning. They include ambiguities, but they also include all cases of language which is devoid of sense or which does not have any clear or precise meaning.

Ambiguities are divided into those which are patent and those which are latent.⁴ The former class includes those which appear upon the face of the writing itself, whether will or deed, before the words are applied to any extrinsic subject

Slevin, 67 Hun, 615; Bullock v. Consumers' Lumber Co. (Cal., 1893), 31 Pac. Rep. 367; Todd v. Roberts, 1 Tex. Civ. App. 8; Forbes v. Darling, 94 Mich. 621; Tompkins v. Merriman, 155 Pa. St. 440; Scraggs v. Hill (W. Va., 1893), 17 S. E. Rep. 185.

¹ Bouvier, Law. Dict.; Ellmaker v. Ellmaker, 4 Watts (Pa.), 89.

² Wigram, in his treatise on Extrinsic Evidence, sections 200 and 201, says in a passage which has been repeatedly cited with approbation: “A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who is unable to read; nor can they be

ambiguous merely because the court which is called upon to explain them may be ignorant of a particular art, fact or science which was familiar to the person who used the words, and a knowledge of which is necessary to a right understanding of the words he has used. If this be not a just conclusion it must follow that the question whether a will is ambiguous might be dependent not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy — a proposition too absurd for an argument.”

³ Wigram, §§ 200-205.

⁴ 1 Greenl. on Ev., § 297; Bacon's Maxims, Reg. 23; Tiedeman, R. P., § 886.

or object, as when a sum of money or the name of a person is differently stated in different parts of the writing.¹ Latent ambiguities occur where the writing itself is clear and consistent, but where, in the language of Lord Bacon, "some collateral matter out of the deed breedeth the ambiguity." Thus, in a devise of a house at A., a latent ambiguity will occur if the testator owned two or more houses in that place.

The general rule is that parol evidence is inadmissible to explain a patent ambiguity, and the writing is, to the extent it is ambiguous, void and inoperative.² But the court has a right to every aid which is within its power in construing any instrument.³ And so in the case of a patent ambiguity, some exceptions have been made to the general rule.⁴

Latent ambiguities, which arise when the language of the instrument is ambiguous or meaningless as applicable to extrinsic circumstances, may always be explained by extrinsic evidence.⁵ They may be divided into two classes: First, where

¹ Thus, a devise "to one of the sons of A." is a good example of a patent ambiguity. *Strode v. Russell*, 2 Vern. 624.

² *Brauns v. Stearns*, 1 Oreg. 367; *Brown v. Brown*, 43 N. H. 25; *Scraggs v. Hill* (W. Va., 1893), 17 S. E. Rep. 185; *Pickering v. Pickering*, 50 N. H. 349; *Pitts v. Brown*, 49 Vt. 86; *Patch v. White*, 1 Mackey (D. C.), 468; *Mann v. Mann*, 1 Johns. Ch. 231; *Griffith v. Furry*, 30 Ill. 251; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Waldron v. Waldron*, 45 Mich. 350; *Hollen v. Davis*, 59 Iowa, 444; *Tucker v. Seamen's Aid Society*, 7 Metc. (Mass.) 183; *Ayres v. Weed*, 16 Conn. 291; *Horner v. Stillwell*, 35 N. J. L. 307; *McDermot v. U. S. Ins. Co.*, 3 S. & R. (Pa.) 604; *Richmond, etc. Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Clark v. Lancaster*, 36 Md. 196; *Bowyer v. Martin*, 6 Rand. (Va.) 525; *Campbell v. Johnson*, 44 Mo. 247; *Harris v. Dinkins*, 4 Desaus. (S. C.) 60; *Chambers v. Ringslaff*, 69 Ala. 140; *Duncan v. Duncan*, 2 Yeates

(Pa.), 302; 2 id. 295; *Weston v. White*, 5 Md. 297; *Mithoff v. Byrne*, 20 La. Ann. 363; *Peacher v. Strauss*, 47 Miss. 358; *Nashville L. I. Co. v. Mathews*, 8 Lea (Tenn.), 299; *Breckinridge v. Duncan*, 2 A. K. Marsh. 50; *Brennan v. Winkler* (S. C., 1893), 16 S. E. Rep. 190. But parol evidence is always admissible to explain illegible words or symbols. *Taylor v. Beavers*, 4 E. D. Smith, 215; *Arthur v. Roberts*, 60 Barb. 550.

³ *Abbott*, Brief on Facts, §§ 148, 149.

⁴ *Collison v. Curling*, 9 Cl. & Fin. 88. "The rule forbidding extrinsic evidence to cure a patent ambiguity is not applicable except the writing is required by a statute which the ambiguity prevents the writing from satisfying." *Abbott*, Brief on Facts, § 152.

⁵ *Hildebrand v. Fogle*, 20 Ohio, 147; *Mason v. Ryus*, 26 Kan. 464; *Howard v. American, etc. Soc.*, 49 Me. 288; *Wheelwright v. Akin* (Ga., 1893), 17 S. E. Rep. 610; *Bell v. Woodward*, 46 N. H. 315; *McAnulty*

the description of the subject-matter, *i. e.*, the property or person mentioned, is clear and certain upon the face of the instrument itself, but it is found by extrinsic evidence that there is more than one estate or subject-matter or more than one person whose description corresponds with legal certainty to the terms of the instrument. Thus, when the testator devises land to a person by name or description and the land is claimed by more than one person, all of whom answer to the name or other description, parol evidence, including the testator's declarations of intention, is admissible to identify the person whom the testator intended to benefit.¹ Second, where

v. Urban, 25 N. Y. S. 274; *Wolfert v. Pittsburg R. Co.*, 44 Mo. App. 330; *Bovee v. Hurd*, 134 N. Y. 456; *Knapp v. Warner*, 57 id. 668; *Clark v. Woodruff*, 83 id. 218; *Neal v. Reams*, 83 Ga. 298; *Bell v. Boyd*, 53 id. 643; *Coals v. Sulan*, 46 Kan. 341; *McDonald v. Dana*, 154 Mass. 152; *Simpson v. Dix*, 131 id. 179; *Lovejoy v. Lovett*, 124 id. 270; *Goff v. Roberts*, 72 Mo. 570; *Brewster v. McCall*, 15 Conn. 274; *Altschul v. San Francisco, etc. Co.*, 43 Cal. 171; *Begg v. Beggs*, 56 Wis. 534; *Peters v. Porter*, 60 How. Pr. (N. Y.) 422; *Thomas v. Truscott*, 53 Barb. (N. Y.) 200; *Sandford v. Newark*, 37 N. J. L. 1; *Wilson v. Horne*, 65 Ala. 448; *Warfield v. Booth*, 33 Md. 63; *Fryer v. Patrick*, 42 Md. 51; *Hawkins v. Garland*, 76 Va. 149; *Piper v. True*, 36 Cal. 606; *Moore v. United States*, 17 Ct. of Cl. 17; *Pratt v. California M. Co.*, 24 Fed. Rep. 869; *United States v. Peck*, 102 U. S. 64; *Lumey v. Wood*, 66 Tex. 22; *Lego v. Medley*, 79 Wis. 211; *Euless v. McAdams*, 108 N. C. 507. A devise to "my children" raises a latent ambiguity when the testator has illegitimate or adopted children, and parol evidence will be received to explain whom should be included by the term. *Ellis v. Houston*, L. R. 10 Ch. Div. 236; *Brower v. Bowers*, 1

Abb. App. Dec. 214; *In re Cahn*, 3 Redf. (N. Y.) 31. "The distinction between latent and patent ambiguity as respects the admissibility of parol evidence lies in the rule that the intention must be gathered from the will itself. If it is a patent ambiguity the will does not express any certain intention and it is therefore void for uncertainty. But if the ambiguity is latent, *i. e.*, discovered *dehors* the will, there would be no ambiguity as to intention if the investigation was confined to the will itself. The ambiguity arising from extraneous facts may be explained away." *Tiedeman, R. P.*, § 884.

¹*Patch v. White*, 117 U. S. 210; *Connolly v. Pardon*, 1 Paige, 291; *Gilmer v. Stone*, 120 U. S. 586; *Dunham v. Averill*, 45 Conn. 61, 68; *Hawkins v. Garland*, 76 Va. 149; *Goodhue v. Clark*, 37 N. H. 525; *Skinner v. Harrison*, 116 Ind. 139; *Matter of Cahn*, 3 Redf. Sur. 31; *Beardsley v. Am. Miss. Soc.*, 45 Conn. 327; *Stokeley v. Gordon*, 8 Md. 496; *Smith v. Smith*, 4 Paige, 271; *Hall v. Leonard*, 1 Pick. 31; *Jackson v. Boneham*, 15 Johns. 296; *Pinson v. Ivey*, 1 Yerg. 296; *Button v. Am. Tract Soc.*, 23 Vt. 338; *Haydon v. Ewing*, 1 B. Mon. 113. *Cf. Eckford v. Eckford* (Iowa, 1893), 53 N. W. Rep. 345; *Hinckley v. Thatcher*, 139

the description is clear, but partly applicable and partly inapplicable as applied to some property or person that is alleged to be intended; as, for example, in cases of misnomer or misdescription of property or persons. In such cases, where the description is untrue in some particular (which fact can only be ascertained by extrinsic evidence), that part of the description which is false will be repudiated, and the remainder, if sufficient to identify the person or thing, will be permitted to go into effect.¹ If the description is wholly inapplicable to the object said to be intended, evidence is inadmissible to show what its author really intended to describe.

§ 222. **Parol evidence to explain wills.**—By the statute of wills which has been enacted in all the states of the Union, wills, with the exception of those termed nuncupative, are required to be in writing, properly authenticated, and parol evidence is inadmissible to control, vary or contradict the language used.² The principles and rules of law applicable to

Mass. 477; *Lefevre v. Lefevre*, 59 N. Y. 434; *Evans v. Grissom*, 40 N. J. L. 549.

¹ *Bristol v. Ontario Orp. Asylum*, 60 Conn. 472; *Faulkner v. National S. Home*, 155 Mass. 458; 29 N. E. Rep. 645; *Chappell v. Missionary Soc.*, 3 Ind. App. 356; 29 id. 924; *Kimball v. Chappell*, 27 Abb. N. C. 437; *Tallman v. Tallman*, 3 Misc. Rep. 465; *In re Lennig's Estate*, 154 Pa. St. 209; 25 Atl. Rep. 1069. But in such cases the declarations of the writer or grantor are inadmissible.

² See *post*, § 269; *In re Gilmore*, 81 Cal. 240; *Vreeland v. Williams*, 32 N. J. Eq. 734; *Turner v. Sav. Inst.*, 76 Me. 527; *Greenough v. Cass*, 64 N. H. 326; *Lee v. Shivers*, 70 Ala. 288; *Foster v. Dickinson*, 64 Vt. 253; *Graham v. Graham*, 23 W. Va. 36; *Crooks v. Whitford*, 47 Mich. 283; *In re Gordon* (N. J., 1893), 26 Atl. Rep. 268; *McDaniel v. King*, 90 N. C. 597; *Senger v. Senger*, 81 Va. 687; *Hancock's Appeal*, 112 Pa. St. 532; *Robinson v. Brewster*, 140 Ill. 649;

Magee v. McNeal, 41 Miss. 17. Thus, for example, a blank in a will cannot be filled by parol evidence showing what words the testator meant to have inserted, as to permit this would be equivalent to making an oral disposition of property where the law requires a writing. *Tuckers v. Seamen's Aid Soc.*, 7 Metc. (Mass.) 205; *Clayton v. Nugent*, 13 M. & W. 200; *Baylis v. A. G.*, 2 Atk. 239; *Hunt v. Hart*, 3 Bro. C. C. 311, cited 8 Bing. 254. On this subject Vice-Chancellor Wigram says: "If, then, a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible; in other words, the judgment of a court in expounding a will must be simply declaratory of what is in the will." Wigram, *Extrinsic Ev.*, § 87.

the interpretation of wills are, it has been said,¹ the same as where other writings are concerned. It is evident, however, that certain elements enter into the consideration of the question how far is extrinsic evidence admissible in relation to wills that are not present where other writings are under consideration. In reply to any demand for an assimilation of contracts and wills in this particular, it may be said that the former instruments possess a mutuality of character and imply a reciprocity of benefits or disadvantages which furnish strong reasons for refusing to allow contracts to be varied by evidence of parol declarations of intention. But the benefit conveyed by a will is voluntary and unilateral. The contents of the instrument itself, unlike a contract or writing between parties, are usually a secret in the keeping of the testator or of his confidential adviser, and this circumstance alone is sufficient to cast some suspicion upon any public oral declarations of the testator as to his intention. The law encourages this secrecy, and, by consistently refusing to regard the secret testamentary act or writing as other than revocable, enables the testator "to baffle with equivocation or misrepresentation the importunities of the expectant and the inquisitiveness of the curious."² So, on general principles, it is manifestly absurd to accept hearsay evidence, which must often necessarily be given by persons who by social connections or by ties of kinship have or imagine they have some moral or legal claims upon the bounty of the testator, to show that the latter, whose lips are now forever sealed by death, meant something other than his intention solemnly and formally committed to writing and authenticated in the express mode prescribed by statute. So, despite the fact that wills are frequently executed under circumstances very unfavorable to mental clearness, or to the lucid expression of intention, and despite the tendency of the courts to favor, so far as is possible, the exercise of the testamentary power so that it may with truth be said that the law prefers that a man should not die intestate, the modern cases construing wills restrict to a greater extent than formerly the admission of parol evidence in relation thereto. At the outset also it is necessary to distinguish carefully be-

¹ 1 Greenl. on Ev., § 287.

² Abbott, Trial Ev., p. 181.

tween extrinsic evidence to show or establish the intention directly, which is never admissible, and extrinsic evidence to explain the intention or to ascertain what it was as expressed by the language of the will, or to show that the will does actually express the testator's intention or that he never intended the writing as testamentary.

So under the general rule that the invalidity of an instrument may be shown, parol evidence is always admitted to show that a paper purporting to be the will of the testator is not his will and does not contain his testamentary intention because it was executed by mistake,¹ in order to effect some non-testamentary object,² or as a duplicate of an earlier writing.³ So parol evidence is always admissible to show that the testator was mentally incapacitated on account of imbecility or insanity.⁴ If a testamentary gift is procured by a promise to hold the same for the benefit of another person, this promise may be shown by parol and it will be deemed to create a constructive parol trust.⁵ Where it is alleged that a will was executed under undue influence, extrinsic evidence is admitted to show the surrounding circumstances of the testator at the moment of execution, his private history and that of his family,⁶ and other facts necessary to enable the court to ascertain

¹ *In re Hunt*, L. R. 3 P. & D. 250; *In re Gordon* (1892), P. 228; *Covert v. Sebern*, 73 Iowa, 564; *Severson v. Severson*, 68 id. 657.

² *Lister v. Smith*, 33 L. J. Prob. 29.

³ *Hubbard v. Alexander*, 3 Ch. D. 738.

⁴ *Ross v. McQuiston*, 45 Iowa, 145; *Ellis v. Ellis*, 133 Mass. 469; *Dyer v. Dyer*, 87 Ind. 13; *Rule v. Maupin*, 84 Mo. 587; *In re Blakely*, 48 Wis. 294; *Harrison's Appeal*, 100 Pa. St. 458; *Frary v. Gusha*, 59 Vt. 257; 9 Atl. Rep. 549; *Schneider v. Manning*, 121 Ill. 376; 12 N. E. Rep. 267; *In re Norman*, 33 N. W. Rep. 374; 72 Iowa, 84; *Prentiss v. Bates*, 93 Mich. 234; *Johnson v. Armstrong* (Ala., 1893), 12 S. Rep. 72; *Bulger v. Ross* (Ala., 1893), 12 S. Rep. 803;

In re Spencer, 96 Cal. 448; *Morris v. Morton* (Ky., 1893), 20 S. Rep. 287.

⁵ *Glass v. Hulbert*, 102 Mass. 42; *Hooker v. Axford*, 33 Mich. 453; *Headley v. Renner*, 130 Pa. St. 542; *Church v. Ruland*, 64 id. 433; *Dowd v. Tucker*, 41 Conn. 197; *Hoge v. Hoge*, 1 Watts, 163, 213; *Williams v. Vreeland*, 29 N. J. Eq. 417.

⁶ *Clark v. Stansbury*, 49 Md. 346; *Reynolds v. Adams*, 90 Ill. 134; *Potter's Appeal*, 53 Mich. 106; *Canada's Appeal*, 47 Conn. 450. Where insanity is alleged it may be shown by parol that he never was mentally incapacitated or that he had recovered or that the will was executed in a lucid interval. *In re Rapple*, 66 Hun, 558; *Shanley's Appeal* (Conn., 1893), 25 Atl. Rep. 245; *In re Spen-*

whether or not such influence existed. So, generally, where the will is written in a foreign language, or where it contains technical words, or common words used in a peculiar sense, or technical, scientific or legal words used in a non-technical sense, or clerical mistakes obvious on its face, or where a devisee is ambiguously described or inaccurately named, parol evidence is admissible under the rules and principles elaborated in this chapter, not to show the intention, but to enable the court to place itself in the position occupied by the testator when he executed the will and to ascertain the intention from the testamentary writing applied to extrinsic objects and read in the light thus derived from surrounding and explanatory circumstances.¹

§ 223. Parol evidence to show absolute deed a mortgage — In suits for specific performance, reformation and cancellation.— It is a rule of general acceptance that parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage, whenever fraud, accident or mistake is alleged in its execution or in the use to which it is put by the grantee.² The tendency at the present day is to afford relief even in the absence of actual fraud or mistake in the execution of the deed, whenever the circumstances are such that the use of the writing as a deed would be inequitable, or where the intention to create a mortgage is shown.³

cer, 96 Cal. 448; *Martin v. Thayer*, 37 W. Va. 38; *Prentiss v. Bates*, 93 Mich. 234.

¹ For a very clear elucidation of the somewhat contradictory rules regulating the reception of parol evidence in connection with wills, the reader is referred to *Abbott's Trial Evidence*, pp. 129-150.

² *First Nat. Bank v. Kreig* (Nev., 1893), 32 Pac. Rep. 641; *Locke v. Moulton*, 96 Cal. 21; *Peugh v. Davis*, 96 U. S. 332; *Campbell v. Dearborn*, 109 Mass. 150; *Harman v. May*, 40 Ark. 146; *First Nat. Bank v. Ashmead*, 23 Fla. 379; *Workman v. Greening*, 115 Ill. 477; *Darst v. Murphy*, 119 id. 343; *Moreland v. Bernhardt*, 44 Tex. 275; *Rogers v.*

Beach, 115 Ind. 413; *Knapp v. Bailey*, 79 Me. 195; *Biggars v. Byrd*, 55 Ga. 650; *Green v. Sherrod*, 105 N. C. 197; *Price v. Grover*, 40 Md. 202; *Hurst v. Beaver*, 50 Mich. 612; *Marshall v. Thompson*, 39 Minn. 137; *Weathersley v. Weathersley*, 40 Miss. 462; *Shradski v. Albright*, 93 Mo. 42; *Pierce v. Traver*, 13 Nev. 526; *Odell v. Montross*, 68 N. Y. 499; *Stephens v. Allen*, 11 Oreg. 188; *Berbesick v. Fritz*, 39 Iowa, 700; *Kinports v. Boyton*, 120 Pa. St. 306; *Kerr v. Hill*, 27 W. Va. 576; *Hickman v. Quinn*, 6 Yerg. (Tenn.) 96; *Edwards v. Wall*, 79 Va. 321; *Nesbitt v. Cavendar*, 27 S. C. 1.

³ The evidence must be clear, convincing and free from doubt in order

Under this rule may be shown the existence of a parol agreement of defeasance, the relation of the parties and the declarations of either, the possession of the premises by complainant, a loan to him by the grantee and his payment of interest, the value of the property as compared with the consideration paid, the needs of the grantor and any agreement to repay.¹ The statute of frauds does not prevent the reception of such evidence, which is introduced not to vary but to invalidate a writing.² The current of authority is decidedly in favor of the

that the deed may be deemed a mortgage. *Ganceart v. Henry* (Cal., 1893), 33 Pac. Rep. 92; *Farmer v. Farmer*, 88 Ala. 545; *Fisher's Appeal*, 132 Pa. St. 488; *Pollock v. Warwick*, 104 N. C. 638; *Franklin v. Ayers*, 22 Fla. 644; *Langes v. Meservey*, 45 N. W. Rep. 732; *Armor v. Spalding* (Colo., 1890), 23 Pac. Rep. 789; *Jameison v. Emerson*, 82 Me. 309; *Strong v. Strong*, 126 Ill. 301; *Barton v. Lynch*, 69 Hun. 1; *Baird v. Rein- inghaus* (Iowa, 1893), 54 N. W. Rep. 148. "In considering the nature and sufficiency of the evidence required to convert a deed absolute on its face into a mortgage, we should never lose sight of the rules and practice of the court of equity at the time it was established by that court that parol evidence could be received for that purpose. . . . The same and no less convincing proofs were required that are necessary to authorize the reformation of a written contract on the ground of mistake. If the proofs are doubtful and unsatisfactory and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy." *Kent v. Lasley*, 24 Wis. 654. See, also, *Clayburgh v. Goodchild*, 19 Atl. Rep. 1015; 135 Pa. St.

421. And compare *Poullain v. Poullain*, 76 Ga. 420, in which it was held that proof beyond a reasonable doubt is not required in cases of mistakes alleged to exist in written instruments.

¹ *Swett v. Parker*, 22 N. J. Eq. 453; *Farmer v. Grove*, 24 Cal. 169.

² *Walker v. Walker*, 2 Atk. 98; *Campbell v. Dearborn*, 109 Mass. 130; *Reigard v. O'Neill*, 38 Ill. 400; *Sewell v. Price*, 32 Ala. 97; *Klein v. McNamara*, 54 Miss. 90; *Carr v. Carr*, 52 N. Y. 251; *Taylor v. Luther*, 2 Sumn. (U. S.) 238. For a full discussion of the equitable doctrine on this subject, see *Tiedeman on Equity*, § 199. In *Campbell v. Dearborn*, 109 Mass. 130, the court, by Wells, J., said: "We do not regard the statute of frauds as interposing any insuperable obstacles to the granting of relief in such a case, because relief, if granted, is attained by setting aside the deed, and parol evidence is availed of to establish the equitable grounds for impeaching that instrument and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case, among which may be included the real agreement.

rule that such evidence is not admissible at law, except perhaps in those states where the distinction between legal and equitable procedure has been abrogated by the modern codes.¹ A third person having a claim against the grantor may show by parol that the deed is a mortgage.² But when the grantee in an absolute deed has reconveyed to an innocent purchaser without notice of the true agreement between the parties, such parol evidence will not be received.³

Where specific performance of a contract is asked, the defendant is permitted to show by parol evidence that the written contract does not, either because of fraud or mistake, represent the real intention of the parties.⁴ On the other hand, where the plaintiff asks for a reformation of the contract on the grounds of mistake and its specific performance as reformed, the cases are at variance. The American cases hold that reformation and specific performance may be obtained in one action by the introduction of parol evidence by the plaintiff, irrespective of the performance by him of the parol portion of the contract.⁵ The English cases hold

It does not violate the statute of frauds to admit parol evidence of the real agreement as an element in the proof of fraud or other vice in the transaction which is relied on to defeat the written instrument."

¹ *Brainerd v. Brainerd*, 15 Conn. 575; *Bragg v. Massie*, 38 Ala. 89; *Hogel v. Lindell*, 10 Mo. 483; *Flint v. Sheldon*, 13 Mass. 443; *Brinkman v. Jones*, 44 Wis. 498; *Jackson v. Lodge*, 36 Cal. 28; *Webb v. Rice*, 6 Hill (N. Y.), 219; *Stinchfield v. Milliken*, 71 Me. 567.

² *Walter v. Cronly*, 14 Wend. (N. Y.) 63; *Allen v. Kemp*, 29 Iowa, 452.

³ *Maxfield v. Patchen*, 29 Ill. 39; *Baughner v. Merryman*, 32 Md. 185; *Rhines v. Baird*, 41 Pa. St. 356. In *Buckman v. Alwood*, 71 Ill. 155, the court said: "It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage by parol evidence under

any specific head of equity, such as fraud, accident or mistake, but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this: that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage without other proof of fraud than is implied in showing that a conveyance taken for the mutual benefit of both parties has been appropriated solely to the use of the grantee."

⁴ *Quinn v. Roath*, 37 Conn. 16; *Coles v. Brown*, 10 Paige, 526; *Berry v. Whitney*, 40 Mich. 65; *Woodworth v. Cook*, 2 Blatchf. 151; *Ryno v. Darby*, 20 N. J. Eq. 31; *Cathcart v. Robinson*, 5 Pet. 263; *Mansfield v. Sherwin*, 81 Me. 365; *Ring v. Ashworth*, 3 Iowa. 452; *Caldwell v. Depew*, 40 Minn. 528. See, also, *Tiedeman on Equity*, § 198.

⁵ *Bellows v. Stone*, 14 N. H. 175;

that this cannot be done unless there has been a part performance of the parol portion.¹ But where cancellation or reformation only is asked, it is well settled that parol evidence is admissible to establish the fraud or mistake as a basis for the relief demanded.²

Grass v. Hurlbert, 102 Mass. 24, 41; Mon. 320; Keyton v. Brawford, 5 Hunter v. Bilyeu, 30 Ill. 228; Quinn Gratt. 39; Larkins v. Biddle, 21 Ala. v. Roath, 37 Conn. 16; Gillespie v. 252; Peterson v. Grover, 20 Me. 463; Moon, 2 Johns. Ch. 585; Beardsley Langdon v. Keith, 9 Vt. 299; Vreeland v. Bramhall, 28 N. J. Eq. 85; v. Knight, 10 Vt. 185; Gower v. Sylvius v. Kosek, 117 Pa. St. 67; Sterner, 2 Whart. 75; Moale v. Buchanan, 11 Gill & J. 314; Newsom Jarrell v. Jarrell, 27 W. Va. 743; v. Bufferton, 1 Dev. Eq. 383; Murphy v. Rooney, 45 Cal. 78; Mosby v. Cox v. Woods, 67 Cal. 317; Smith v. Butler, 11 Oreg. 46; Crockett v. Wall, 23 Miss. 81; Hallam v. Corlett, Crockett, 73 Ga. 647; Jackson v. Maybee, 21 Fla. 632; Bond v. Dorsey, 71 Iowa, 446. 65 Md. 310; Giles v. Hunter, 103 N. C. 194; Fritzler v. Robinson, 70

¹ Tiedeman on Equity, § 198, citing cases.

² McCloskey v. McCormick, 44 Ill. 336; Wurzbarger v. Merie, 20 La. Ann. 415; McCann v. Letcher, 8 B.

Iowa, 500. See, also, Tiedeman on Equity, § 198, where this subject is fully discussed.

CHAPTER XVII.

PRESUMPTIONS.

§ 224. Definition and classification.	§ 230. Presumptions from the usual course of trade.
225. Presumptions of law and fact distinguished.	231. Lawfulness — Continuity — Sanity — Insanity.
226. Presumptions of fact.	232. Presumptions as to jurisdiction.
227. Presumptions from adverse possession and prescription.	233. Presumptions of life, death and survivorship.
228. Presumptions from lapse of time.	234. Legitimacy — Innocence — Malice.
229. Presumptions from possession.	

§ 224. **Definition and classification.**— Presumptions, as they are employed in the law of evidence, are divided into presumptions of law and presumptions of fact, while the former are subdivided into those which are conclusive and those which are rebuttable. A conclusive, or, as it is sometimes called, an absolute or imperative presumption of law, may be defined as a rule of law by which, upon the production of certain evidence, or upon the proof of a certain fact, the judge is bound by law to regard some other fact as proved, to instruct the jury to that effect, and to exclude any evidence to the contrary, however satisfactory or convincing it may be.

A presumption of law is rebuttable or disputable when its effect is to compel the court to draw a particular inference from a particular fact, or from particular evidence (*i. e.*, to consider some other fact as proved), unless and until the correctness of such inference is disproved.¹ It will be seen that the effect of the operation of presumptions of law is to take the case out of the hands of the jury by forbidding or dispensing with evidence to controvert or disprove the facts which are presumed to be true. This result always occurs in the case of conclusive presumptions, and for this reason this

¹ Sir Fitz James Stephen, in his *v. Guild*, 5 Heisk. (Tenn.) 182; *Ulrich v. Ulrich*, 186 N. Y. 120.

class of presumptions, for all practical purposes, is hardly distinguishable from positive legal rules. Indeed it may be correctly said that a conclusive presumption of law is only a rule of substantive law stated in terms of the law of evidence, which, like all rules of law, is to be determined and expounded by the court alone, the judicial exposition and instruction being in every case obligatory on the jury. Thus, the presumption of law that a boy under the age of fourteen years is incapable of the crime of rape is a positive maxim of the common law, and would apply whenever a person is accused of that crime, even though no evidence is introduced to show that he did or did not commit it.¹ So generally is this recognized, that indisputable or conclusive presumptions are now seldom regarded by the courts solely as rules of evidence.

The common-law conclusive presumptions have been so far superseded by statutes of limitation that in the modern codes of evidence it has not been considered necessary to recognize their existence as rules of evidence.²

§ 225. Presumptions of law and of fact distinguished.—A presumption of fact is an inference or a deduction which any sensible man who is possessed of average reasoning powers may draw from certain facts coming under his consideration, provided those facts are not disproved by evidence of the same sort as that by which they are supported.³

Direct evidence of a fact in issue is always desirable. But this is often impossible to obtain. So if some other fact is proved which is a concomitant circumstance usually attendant upon the fact in issue according to the experience of average men, a presumption of the existence of the latter fact, or, to use a short term, a "presumption of fact," arises which is valid until it is rebutted by proof of a contradictory fact.

The doctrine regulating presumptions of fact is largely the

¹ *McKinney v. State* (Fla., 1892), 11 S. Rep. 732. town, 34 N. H. 365; *Oaks v. Weller*, 16 Vt. 71; *Hilton v. Bender*, 69 N. Y. 75; *Cranan v. New Orleans*, 16 La. Ann. 374.

² In the following cases presumptions are defined and discussed: *Insurance Co. v. Weide*, 11 Wall. (U. S.) 441; *Jackson v. Marford*, 7 Wend. (N. Y.) 62; *Bow v. Allen-*

³ *Gardner v. Gardner*, L. R. 2 App. Cases, 723, 734.

basis for the rules governing the admissibility and sufficiency of circumstantial evidence. In the first place, it may be said that a presumption of fact derives its main, if not its only, value and force from its probability and from the closeness and clearness of the logical connection which exists between the fact or facts which have been proved and the inference which is drawn. In other words, it is an inference "of a fact from a fact," and the test is the relevancy of the facts proved which constitute the premises to the doubtful but probable fact which has been inferred and which is the conclusion of the syllogism thus created.¹

It should not be considered, however, that all presumptions of law are illogical and arbitrary, though they do not all by any means possess equal logical validity. Thus, it is clear that many which are conclusive and which are now embodied in statutes of limitation were originally adopted from considerations of expediency² to protect vested rights and prevent the mischievous stirring up of controversies supposed to be settled.³ So also rebuttable presumptions are not wholly exempt from the criticism that they are improbable and illogical, as for examples the common presumption that an accused person is innocent till he is proved guilty, or the very numerous modern class of rebuttable presumptions which have been created by statute. Again, the two classes are distinguished by the fact that presumptions of law, both rebuttable and conclusive, are applied to classes of objects, and they have been subjected to and are governed by well-settled rules, thus forming a part of an intricate and systematic department of jurisprudence.

Presumptions of fact are invariably permissible, never obligatory on the jury. They may or they may not be drawn by the jury from the circumstances, according as the jurors believe or disbelieve the facts which are produced before them and which are claimed to be proved by direct evidence.

¹ In *Roberts v. People*, 9 Colo. 474, the court, by Beck, C. J., defines a presumption of fact as "an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known."

² See *Welch v. Sackett*, 12 Wis. 257.

³ "Prescription is a legal fiction to quiet ancient possession." *Folsom v. Freeborn*, 13 R. I. 205.

If, therefore, no presumption of law has arisen on the evidence as introduced, it is error for the court to instruct the jury that "a presumption arises on certain evidence," meaning thereby only a presumption of fact, or that the evidence is sufficient to justify a presumption of fact; for whether a presumption of fact arises or not, and the sufficiency of the evidence to support it, are questions for the jury to decide upon the evidence before them.¹ When made they do not arise by the direct employment of legal rules, but according to the reasoning process and experience of average men, being the most probable inferences from the facts of the case.²

A presumption of law is binding on the court and must be drawn by it whenever certain evidence is given, and, whether conclusive or not, the law, regarding it as law, is binding on the jury if they believe the basic facts are proved. If it is a conclusive presumption of law the judge has no power to admit, or the jury to consider, any evidence to the contrary; but if it is rebuttable, then it is only obligatory upon the jury, provided no evidence to contradict it is offered sufficient to remove the particular case under consideration out of the class in which by law it is *prima facie* presumed to be included.

"Facts which are presumed by the jury are proved as effectually as facts of which direct evidence is given."³ But, as has been elsewhere explained in the analogous case of circumstantial evidence, the foundation fact from which the inference is made must be supported by some direct evidence sufficient to furnish a basis in the minds of reasonable and intelligent men for the presumption of fact. In some departments of scientific investigation and intellectual activity it is permissible to infer a series or system of facts in a logical

¹ *Stone v. Geyser, etc. Co.*, 52 Cal. 315; *Allison v. State*, 42 Ind. 354; *Read v. Hurd*, 7 Wend. (N. Y.) 408.

² In *Com. v. Briant*, 142 Mass. 463, the court said: "The proposition that there is evidence for the jury to consider is not identical with the proposition that evidence if believed raises a presumption of fact. The proposition that there is evidence to

be considered imports that there may be a presumption of fact. But generally it must be left to the jury to say whether there is one, and in many cases that is the main question they have to decide." See, also, *Com. v. Stevenson*, 142 Mass. 146.

³ *Dickens v. Mahana*, 21 How. (U. S.) 283.

sequence or connection based upon one or two facts of which alone direct proof has been given. Inferences are deduced from inferences; the intervening facts, which should be proved to secure the validity of the hypothesis or final inference, being taken for granted, upon the theory of the experienced invariability and uniformity of the laws of the physical universe.¹ But where the springs of human action and the motives which prompt men in their conduct towards their fellows are concerned, no inferences are allowed to be drawn from other inferences, and any presumption of fact must be an immediate inference or conclusion from facts directly proved. So, too, the jury should not be allowed to presume certain material facts of which no evidence has been given, merely from a rebuttable presumption of law with which the facts have only a remote connection if any.² Thus, if money is alleged to have been misappropriated by a fiduciary whose duty it was to pay the money to some third person, the jury have no right to presume that the money has been properly paid over where the only basis for this presumption of fact is the rule that everyone is presumed innocent until proved guilty and that private and public officials are presumed to have done their duty.

The legislature has the power, within constitutional limits, to establish statutory presumptions of law both conclusive and rebuttable. This power has been repeatedly exercised in the enactment of criminal statutes, and, if properly executed, is calculated to enlarge the scope of the power of the jury by creating an issue of fact to be submitted to them which, were there no presumption, would probably be taken from them upon the ground that the evidence is insufficient.

§ 226. **Presumptions of fact—Accomplices.**—Though presumptions of fact cannot with strictness of language be said to form a part of the law of evidence,³ yet it is an almost universal custom for the judge, in his discretion, to suggest to the jury certain rules which they may employ in weighing evidence, and to point out certain inferences of fact which

¹ *Sabariego v. Maverick*, 124 U. S. 295. *Ins. Co., 100 U. S. 698; Grand Trunk, etc. Co. v. Richardson*, 91 U. S. 470.

² *United States v. Ross*, 92 U. S. 283; *Manning v. Hancock Mut. Life*

³ 1 Greenl. on Ev., § 44.

they may, but need not necessarily,¹ draw therefrom. If evidence is submitted, it is for them exclusively to say whether they will draw any inference therefrom, and this they may do unaffected by motives of expediency and concerned only to ascertain the truth.

No presumption of law exists against the testimony of an accomplice, and the jury may, in the absence of a statute, convict upon his uncorroborated testimony alone, if they are satisfied of its truth beyond a reasonable doubt.² An accessory after the fact is not an accomplice.³ But judges have been so long accustomed to instruct that the testimony of an accomplice should be received with caution, or should be corroborated by satisfactory evidence from some witness not implicated, that a failure to do so would generally be reversible error.⁴

§ 227. Presumptions from adverse possession and prescription.—A common class of presumptions which are in many cases positive rules of the statute law is that which includes those arising from the adverse possession of real property or from the fact that an obligation either of the nature

¹ See § 226.

² See *post*, §§ 324, 325; *Jenkins v. State* (Fla., 1893), 12 S. Rep. 677; *State v. Minor* (Mo., 1893), 22 S. W. Rep. 1085; *State v. Jackson*, 106 Mo. 174; *Rountree v. State*, '88 Ga. 457; *Woods v. Com.*, 86 Va. 929; *United States v. Lancaster*, 44 Fed. Rep. 896; *Robinson v. State*, 84 Ga. 674; *Cheatham v. State*, 7 S. Rep. 204.

³ *State v. Umble* (Mo., 1893), 22 S. W. Rep. 380.

⁴ *United States v. Ybanez*, 53 Fed. Rep. 536; *Martin v. State*, 21 Tex. App. 1; *People v. White*, 62 Hun, 114; *State v. Jackson*, 106 Mo. 174; *State v. Henderson*, 50 N. W. Rep. 758; *Malachi v. State*, 89 Ala. 124; *People v. Chadwick*, 25 Pac. Rep. 737; *Wicks v. State*, 28 Tex. App. 448; *Bernhard v. State*, 76 Ga. 613. In considering the rather anomalous rule which permits a conviction to

be had upon the uncorroborated testimony of an accomplice, but which, at the same time, allows the court to charge in the most absolute terms that his testimony must be corroborated, the court in *Collins v. People*, 98 Ill. 584, said: "In many, probably in most, cases the evidence of an accomplice, uncorroborated, . . . will not satisfy the honest judgment beyond a reasonable doubt, and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such case it would be an outrage upon the administration of justice to acquit."

of a simple contract or of a writing under seal has been created and the disseizee or obligee has neglected to enforce his right. The tortious possession of a disseizor may create a conclusive presumption of title either by the existence of the disseizin for the period required by the statute of limitations or by estoppel. By the statute of limitation of real actions of 21 Jac. 1, the period of limitation for the recovery of real property was fixed at twenty years from the date that the right of action accrued. In the United States the same period has been generally adopted, though in many of the states it has been reduced to ten.¹ The provisions of the various statutes of limitation should in each case be consulted, and as these statutes vary widely it is impossible to discuss them at length in this place. It may be said, however, that, in the absence of express provision, they do not run against the United States or against a state commonwealth,² or against persons who are under the disabilities of infancy or of insanity when the right of action accrues.³

It was a rule of the common law that the continuous and uninterrupted enjoyment of an incorporeal hereditament or easement for a period beyond the memory of man would create a title by prescription, upon the legal fiction that a valid grant had been made but that the grant had been lost.⁴ In consequence of the adoption of statutes of limitation the courts now apply the same period of limitation to incorporeal as to corporeal hereditaments;⁵ but as this application rests solely

¹ Angell on Limitations, 1-6, 65 et seq.; Tiedeman on Real Property, ch. XX, §§ 713-717; Detweiler v. Shultheis, 122 Ind. 155; Charles v. Morrow, 99 Mo. 638; 12 S. W. Rep. 903; Norris v. Moody, 84 Cal. 143. The adverse possession and disseizin must have been continuous and uninterrupted during the statutory period. Malloy v. Bruden, 88 N. C. 231; Bradley v. West, 60 Mo. 33; Satterwhite v. Rosser, 61 Tex. 166; McName v. Morland, 26 Iowa, 96; Unger v. Mooney, 63 Cal. 586; Tiedeman on Real Property and cases cited.

² Lindsey v. Miller, 2 Pet. 660; United States v. Thompson, 98 U. S. 489; Gardiner v. Miller, 47 Cal. 570; Oaksmith v. Johnson, 92 U. S. 343; Kingman v. Sparrow, 12 Barb. 201; United States v. Beebe, 17 Fed. Rep. 36; Ward v. Bartholomew, 6 Pick. 409.

³ Miller v. Texas, 132 U. S. 662; Gage v. Smith, 27 Conn. 74; Little v. Downing, 37 N. H. 355; Edso v. Munsell, 10 Allen, 557.

⁴ 2 Bl. Com., §§ 263, 266.

⁵ Tiedeman on Real Property, § 599; Richard v. Williams, 7 Wheat. 59; Stearns v. Jones, 12 Allen, 582; Wat-

upon analogy, the lapse of the period has been held by some courts in the case of easements to create a disputable presumption, or a presumption of fact which can be rebutted by evidence that there never had been any grant.¹ The majority of the cases, however, sustains the proposition that the presumption of an original grant, arising from the uninterrupted and continuous enjoyment of an incorporeal hereditament, is conclusive.²

kings v. Peck, 13 N. H. 360; *Burdell v. Blain*, 66 Ga. 170; *Jones v. Crow*, 32 Pa. St. 398; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Nichols v. Wentworth*, 100 N. Y. 455; *Folsom v. Freeborn*, 13 R. I. 205; *Smith v. Putnam*, 62 N. H. 369; *Wallace v. Uni. Pres. Ch.*, 111 Pa. St. 164; *McKenzie v. Elliott* (Ill., 1890), 24 N. E. Rep. 965.

¹ See cases cited *supra*; *Tinkham v. Arnold*, 3 Me. 120; *Parker v. Foote*, 19 Wend. 309; *Brookline v. Mackintosh*, 133 Mass. 226; *Sherwood v. Burr*, 4 Day, 244; *Thomas v. England*, 71 Cal. 458; *Tredwell v. Inslee*, 120 N. Y. 458.

² *Ingraham v. Hutchison*, 2 Conn. 584; *Carter v. Tinicum Co.*, 77 Pa. St. 310 (right of fishery); *Whitney v. Cotton Mills* (Mass., 1890), 24 N. E. Rep. 774; *Rooker v. Perkins*, 14 Wis. 557; *McGeorge v. Hoffman* (Pa., 1890), 19 Atl. Rep. 413; *Bolivar v. Nepensett*, 16 Pick. 241; *Ricard v. Williams*, 7 Wheat. 109; *Corning v. Gould*, 16 Wend. 531; *Campbell v. West*, 44 Cal. 646; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Arimond v. Green Bay, etc.*, 35 Wis. 41; *Dowling v. Hennings*, 20 Md. 180; *Louisville, etc. Co. v. Hays*, 11 Tenn. 383; *Conklin v. Boyd*, 46 Mich. 56; *Smith v. Bennett*, 1 Jones (N. C.), 372; *Warren v. Jacksonville*, 15 Ill. 236; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Benton v. Robbins*, 71 N. C. 388; *Tracy v. Atherton*, 36 Vt. 503. In the

case of easements no presumption arises in favor of the public against a private owner of lands. *Warren v. Jacksonville*, 15 Ill. 236; *Pearsall v. Post*, 20 Wend. 121; 22 id. 440; *Curtis v. Kessler*, 14 Barb. 511; *Johnson v. Duer* (Mo., 1893), 21 S. W. Rep. 800. "The statutes (of limitation) confer no right of action. They restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience that claims which are valid are not usually allowed to remain neglected. The lapse of years, without any attempt to enforce a demand, creates, therefore, a presumption against its original validity or that it has ceased to subsist. The presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from prosecution of stale claims, when by loss of the evidence by the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. Their policy is to encourage promptitude in the prosecution of remedies. For this purpose they prescribe what is supposed to be a reasonable period." *Field, J.*, in *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 390, cited in *Anderson's Law Dict.*, p. 629.

§ 228. **Presumptions from the lapse of time.**—In certain transactions which are not of record, a presumption of regularity is held to be created by the lapse of time and the silence or the actions of the parties. The presumption thus created is largely the result of the application of the principles of *estoppel in pais* and of the statute of limitations. Accordingly, where a sale of land is authorized either by statute¹ or by license or a judgment of a court, it will be presumed *prima facie* from the lapse of time that all the required formalities and details have been observed. The power to act being proved or admitted, it will be inferred that all the usual precautions were taken necessary to a valid execution of the power. And this inference is strengthened by the silence of the parties who are concerned and the hardship of requiring the production of written proof of minute details of transactions of which no record is usually made.

The length of time which will create this presumption varies according to the circumstances of the case; for although the lapse of thirty years has been required in some cases, other cases hold that a much shorter period will suffice.²

Where an estate was vested in trustees it may be presumed that they have faithfully performed their duties and executed a conveyance or surrender to the beneficiary on the termination of the trust.³ Again, where possession of real property has been long, continuous and uninterrupted, so that it is under the statute of limitation *prima facie* lawful, and the things done and omitted to be done in respect thereto by the parties for long periods can be explained satisfactorily only upon the hypothesis of the existence of a deed, the execution of a deed may be presumed.⁴

¹ Stead v. Corse, 4 Cranch, 403; Hilton v. Bender, 69 N. Y. 75, applying this rule to tax sales.

² King v. Little, 1 Cush. 436; Pejepscot v. Ransom, 14 Mass. 145; Emmons v. Oldham, 12 Tex. 18; Society v. Young, 2 N. H. 310; Cobleigh v. Young, 15 id. 493; Allegheny v. Wilson, 25 Pa. St. 332; Freeman v. Thayer, 33 Me. 76. Cf. Hilton v. Bender, *supra*.

³ Moore v. Jackson, 4 Wend. (N. Y.) 59; Church v. Mott, 7 Paige (N. Y.), 77; Mathews v. Ward, 10 Gill & J. 443.

⁴ Fletcher v. Fuller, 120 U. S. 534, 551, 552; Valentine v. Piper, 22 Pick. 85; Van Dyck v. Van Buren, 1 Caines, 84; Knox v. Jenks, 7 Mass. 488. Cf. House v. Montgomery, 19 Mo. App. 170.

§ 229. **Presumptions from possession.**—As respects personal property, a presumption of ownership arises from evidence that a person has exercised acts of possession over it.¹ This presumption is slight, and is rebutted by facts tending to show, for example, that the goods were stolen. A contrary presumption is then created which, if not rebutted by the party in whose possession the stolen goods have been found, may result in fastening the theft upon him.²

Upon the general question whether the possession of the fruits of crime, as of a forged writing, of counterfeit money, or goods taken from a house where a burglary had been committed, causes any presumption of guilt to attach to their possessor, the courts are divided. It was at one time held, nor is this rule without the support of modern cases, that a presumption of law was created that a person in whose possession the results of crime recently committed were found was *prima facie* concerned in the crime committed.³ The most recent decisions, however, repudiate this doctrine that any presumption of law arises; and doubtless the true modern rule is that the presumption, if any, is one of fact. In other words, the fact of possession is now considered as merely a circumstance to be submitted to and weighed by the jury in determining the guilt of the accused.⁴ While the effect of such evidence is for the jury, whether it is admissible depends largely upon the shortness of the time which has elapsed

¹ Rankin v. Bell, 19 S. W. Rep. 874; National Bank v. Richardson, 2 N. Y. S. 804; Powers v. Braley, 41 Mo. App. 556; Gregg v. Mallett, 15 S. E. Rep. 936; 111 N. C. 74; Magee v. Scott, 9 Cush. (Mass.) 150; Millay v. Butts, 35 Me. 139; Fish v. Scut, 21 Barb. 33; Stoddard v. Buxton, 41 Iowa, 582. The possession of a house raises no presumption of ownership of personalty contained in but not annexed to it. Caraher v. Insurance Co., 63 Hun, 82.

² State v. Moore, 101 Mo. 316; State v. Van Winkle, 80 Iowa, 15; Reed v. State (Ark., 1891), 16 S. W. Rep. 819.

³ State v. Kelly, 73 Mo. 608; People v. Weldon, 111 N. Y. 569; Rex v. Fuller, Russ. & Ry. 308; Stover v. People, 56 N. Y. 316; State v. Owsley, 111 Mo. 450; McLain v. State (Neb., 1885), 7 Crim. L. Mag. 199.

⁴ State v. Rights, 82 N. C. 675; State v. Raymond, 46 Conn. 345; Ayres v. State, 21 Tex. App. 399; Ryan v. State, 83 Wis. 486; Sahlinger v. People, 102 Ill. 241; State v. Hodge, 50 N. H. 510; State v. Bishop, 51 Vt. 287; People v. Mitchell, 55 Cal. 236; Stuart v. People, 42 Mich. 255; Galvin v. State, 93 Ind. 550.

since the commission of the crime and the actual knowledge of the prisoner that the goods were in his possession.¹

While the wilful mutilation or destruction of written evidence raises a *prima facie* presumption of law that it was not done innocently and that its production intact would have been injurious to the interest of the person who is guilty of destroying or mutilating it,² the mere invention of verbal evidence or false testimony on the witness stand creates no presumption of law, but is a circumstance to be considered by the jury³ bearing on the credit they will give the witness. If, however, the perjury is deliberate and upon material facts, the jury may infer, under the maxim *falsus in uno falsus in omnibus*,⁴ that the testimony of the witness is wholly unworthy of belief, though not compelled to do so by any rule of law.

Under peculiar and special circumstances the suppression of evidence or a refusal to produce it may raise a presumption that its tenor and effect would be unfavorable to the persons in whose possession it is known to be.⁵ So, if a wrong or injury which is inflicted not only substantially damages a party, but at the same time deprives him of the means of showing the nature and extent of his damage, the law will endeavor to supply the loss and the resulting insufficiency of proof by raising all reasonable presumptions against the evil doer and in favor of the injured person.⁶ But generally the fact that

¹ Gablick v. People, 40 Mich. 292; Co. Ct. Rep. 31; Cross v. Bell, 34 Com. v. Talbot, 2 Allen (Mass.), 161; N. H. 85; Carpenter v. Willy, 26 Payne v. State, 21 Tex. App. 184; Atl. Rep. 488; Gulf, etc. Co. v. State v. Scott (Mo., 1892), 19 S. W. Rep. 89; State v. Owsley, 111 Mo. 450; Smathers v. State, 46 Ind. 447; Sahlinger v. People, 102 Ill. 241; State v. Jennett, 88 N. C. 605.

² See *ante*, § 129; Blade v. Noland, 12 Wend. 173; 1 Kent's Com. 157; Mersman v. Werges, 112 U. S. 141. See § 129; Tobin v. Shaw, 45 Me. 331.

³ 1 Greenl. on Ev., § 37; Wills on Cir. Ev. 113. See, also, *post*, § 342a; State v. Knapp, 45 N. H. 148.

⁴ See § 342a.

⁵ Packer v. Vandevender, 13 Pa.

Co. Ct. Rep. 31; Cross v. Bell, 34 N. H. 85; Carpenter v. Willy, 26 Atl. Rep. 488; Gulf, etc. Co. v. Ellis, 54 Fed. Rep. 481; Werner v. Litzinger, 45 Mo. App. 106; Toomey v. Lyman, 61 Hun, 623; Atl. Ins. Co. v. Holcomb, 88 Ga. 9; Wimer v. Smith, 22 Oreg. 469; Bagley v. McMickle, 9 Cal. 430.

⁶ Little Pittsburg Con. Mining Co. v. Little Chief Cons. Mining Co., 11 Colo. 223; 7 Am. St. Rep. 226; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Clark v. Miller, 4 Wend. 628. If by statute a witness is precluded from testifying, *e. g.*, a wife in an action brought by the husband for her seduction, her failure to testify of course creates no presumption.

a party produces no witnesses, or, having produced them, fails to examine them,¹ or fails to produce any particular witness,² will not justify the jury in drawing any inference that the evidence of his opponent is true if, upon the facts of the case, they are not satisfied with its credibility.³ So, generally, the non-production of books or papers does not necessarily create the presumption that they contain entries which would prove injurious to the party in whose possession they are and who has been notified to produce them.⁴ But where certain documents of a series constituting muniments of title were suppressed by their admitted holder, it was held that an inference of fact might be drawn in the absence of clear evidence of their contents that, had they been produced, they would have proved unfavorable to him.⁵ If a note, bond or similar security be found in the hands of the maker or obligor after maturity, it will be presumed to have been paid,⁶ and this

Adams v. Maine, 3 Ind. App. 232; 29 N. E. Rep. 792. See *ante*, § 166. But where one is charged with fraud, his failure to testify (*Conn. Mut. L. Ins. Co. v. Smith* (Mo., 1893), 22 S. W. Rep. 623), or to produce documents in his possession, creates a presumption against him. *Clifton v. United States*, 4 How. (U. S.) 242. A refusal to produce property claimed by another raises a presumption that its value is as stated by the claimant. *Sutton v. Davenport*, 27 L. J. C. P. 54.

¹ *Haynes v. McRae* (Ala., 1893), 11 S. Rep. 270.

² *Scovill v. Baldwin*, 27 Conn. 316; *Cramer v. Burlington*, 49 Iowa, 213; *Gardner v. Benedict*, 27 N. Y. S. 3.

³ *Enos v. St. Paul, etc. Co.* (S. D., 1893), 57 N. W. Rep. 919; *Meagley v. Hoyt*, 125 N. Y. 771; *Sauer v. Union Oil Co.*, 9 S. Rep. 566; *Cross v. Lake, etc. Co.*, 69 Mich. 363; 37 N. W. Rep. 361; *Mooney v. Holcomb*, 15 Oreg. 639; 16 Pac. Rep. 716; *Diel v. Railway Co.*, 37 Mo. App. 454.

⁴ *Thompson v. Thompson*, 77 Ga. 692; *Cartier v. Lumber Co.*, 35 Ill. App. 449; *Harrison v. Kiser*, 79 Ga. 588; 4 S. E. Rep. 320; *Jennings v. Railroad Co.*, 97 N. Y. 438; *Reavis v. Overinshaw*, 105 N. C. 369.

⁵ *Jones v. Knauss*, 31 N. J. Eq. 609; *Thompson v. Thompson*, 9 Ind. 323.

⁶ *Porter v. Nelson*, 121 Pa. St. 628; *Lindsay v. McCormick*, 5 S. E. Rep. 834; *Turner v. Turner*, 80 Cal. 141; *Hollenberg v. Lane*, 47 Ark. 394; *Weidner v. Schweigert*, 9 S. & R. 385. A note found among the papers of the maker after his death will be presumed to have been in his possession during his life-time. *Potts v. Coleman*, 86 Ala. 94. Though the circumstance of the debtor's ability to pay does not alone create a presumption of payment (*Morrison v. Collins*, 127 Pa. St. 28), it may be sufficient in connection with the fact that the creditor had abundant opportunity to collect his debt. *Bank v. Howes*, 33 Mo. App. 214.

presumption, though usually rebuttable,¹ has been held conclusive where the evidence was otherwise irreconcilable.²

A *prima facie* presumption of payment or delivery is also created by the possession by the drawee of an order for money or for the delivery of personal property.³ That a deed has been delivered will be presumed from the fact that it is found in the possession of the grantee or of one claiming under him, properly executed and acknowledged,⁴ although this presumption may be rebutted by the fact that it was not recorded until after the death of the grantor.⁵ So a deed will be presumed to have been executed and delivered on its date,⁶ though it was acknowledged⁷ or recorded⁸ subsequently. Where several documents are of even date they will be presumed to have been executed in the order that will effectuate the object intended.⁹ But it has been held that the delivery will be presumed to have been made on the day the deed was acknowledged,¹⁰ and this is necessarily the rule where the deed itself is undated.¹¹ This presumption of delivery on the date of execution may be rebutted by showing a subsequent actual delivery.¹² No presumption is created by delivery to a stranger, and in such a case the intention to deliver must be

¹ Hawkins v. Harding, 37 Ill. App. 564. But see, *contra*, Emerson v. Mills, 83 Tex. 385; Halfin v. Wempleman, 83 id. 385; Stephenson v. Richardson, 45 Mo. App. 544.

² Hawkins v. Harding, 37 Ill. App. 564.

³ Lane v. Farmer, 13 Ark. 63; Kincaid v. Kincaid, 8 Humph. (Tenn.) 17; Ramson v. Adams, 17 Johns. (N. Y.) 130.

⁴ Gifford v. Corrigan (N. Y.), 11 N. E. Rep. 498; Meech v. Fowler, 14 Ark. 29; Lyerly v. Wheeler, 12 Ired. 290; Darst v. Bates, 51 Ill. 439; Billings v. Stark, 15 Fla. 297; Tiedeman on R. P., § 812; Ward v. Lewis, 4 Pick. 518; Dais' Appeal, 128 Pa. St. 572; Scobey v. Walker (Ind., 1888), 15 N. W. Rep. 674; Criffen v. Griffen, 125 Ill. 430; 17 N. E. Rep.

782; Windom v. Schappel, 39 Minn. 35; 38 N. W. Rep. 757; Tuttle v. Rainey, 98 N. C. 513; Ward v. Dougherty, 75 Cal. 240; 17 Pac. Rep. 193; Crowder v. Searcy, 103 Mo. 97; Vreeland v. Vreeland, 48 N. J. Eq. 56.

⁵ Scott v. Scott, 95 Mo. 300.

⁶ See cases in note 4, *supra*.

⁷ People v. Snyder, 41 N. Y. 397.

⁸ Robinson v. Wheeler, 25 N. Y. 252.

⁹ Williams v. Woods, 16 Md. 220.

¹⁰ Fontaine v. Sav. Inst., 57 Mo. 561; Blanchard v. Tyler, 12 Mich. 339; Loomis v. Pingree, 43 Me. 299, 308; Henry v. Bradshaw, 20 Iowa, 355.

¹¹ Bank v. Mersereau, 3 Barb. Ch. 528.

¹² Wyckoff v. Remsen, 11 Paige, 564; Abb. Tr. Ev. 695.

express.¹ Delivery and acceptance are concurrent acts, and a *prima facie* presumption of acceptance by the grantee will usually be created from his knowledge of the delivery and from the benefit derived by him thereby.² And in the case of a grantee under disabilities, this presumption of acceptance will be conclusive even if the grantee is ignorant of the conveyance and delivery.³ The ownership of goods named in a bill of lading is *prima facie* presumed to be in the consignee,⁴ while his possession of that document creates a presumption that the merchandise was properly delivered to the carrier and that he assented to its terms.⁵

§ 230. Presumptions from the usual course of trade.—Every one is presumed to take proper care of his own affairs and not to act against his own interests. From this principle, and keeping in view the care, promptness and diligence with which men pursue the objects of their ambition, various *prima facie* presumptions have been recognized growing out of the course of trade. So a check, note or bond properly signed will, in the hands of a *bona fide* holder, be presumed to have been delivered completely executed to the payee,⁶ even though in the case of a bank-note the signature has been obliterated.⁷ So it is a general rule that a party who produces a note will be *prima facie* presumed to be its *bona fide* holder and to have

¹ Maynard v. Maynard, 10 Mass. 456; Folk v. Vara, 9 Rich. Eq. 303; Cecil v. Beaver, 28 Iowa, 240; Lutes v. Reed, 138 Pa. St. 191; Tiedeman on R. P., § 814.

² Gifford v. Corrigan, 117 N. Y. 257; Bowman v. Griffith, 35 Neb. 361; Robinson v. Gould, 26 Iowa, 93; Baker v. Haskell, 47 N. H. 479.

³ Tiedeman on R. P., § 814; Spencer v. Carr, 45 N. Y. 410; Cecil v. Beaver, 28 Iowa, 241; Peavey v. Tilton, 18 N. H. 152; Gregory v. Walker, 38 Ala. 26; Bank v. Bellis, 10 Cush. 378; Rivard v. Walker, 39 Ill. 413; Diefendorf v. Diefendorf, 8 N. Y. S. 617.

⁴ Lawrence v. Minturn, 17 How. (U. S.) 100.

⁵ Boorman v. Express Co., 21 Wis. 153.

⁶ Hensel v. Chicago, etc. Co., 37 Minn. 87. So, too, consideration in such a case will be presumed and need neither be expressed in the instrument, pleaded or given in evidence. Carnright v. Gray, 11 N. Y. S. 278; 27 N. E. Rep. 835; McClelland v. McClelland, 42 Mo. App. 32; Benedict v. Driggs, 34 Hun, 94; Conger v. Armstrong, 3 John. Cas. 5; Norton v. Norton, 17 N. Y. St. Rep. 487.

⁷ Murdock v. Union Bank, 2 Rob. 112; Smith v. Smith, 15 N. H. 55.

obtained it before maturity and for full value.¹ Landlords being usually prompt in collecting rent due them, the existence of a rent receipt for last month in the possession of the tenant creates a *prima facie* presumption that all prior rent has been paid;² and a settlement between parties having continuous dealings is presumed to cover all accounts between them.³ On the other hand, payment by check or in money, unaccompanied by explanatory circumstances, will raise the presumption not that a loan has been made, but that the payor has liquidated a debt or paid to the payee funds belonging to the latter.⁴ If, however, it is shown that no debt existed, then a loan will be presumed, as the law will not in such a case presume a gift.⁵

Comprised in this class of presumptions from the usual course of business are those created by the well-recognized regularity and promptness with which business is conducted in public offices.⁶ So it is said that a postmark furnishes a presumption that a letter was in the mail at the time marked.⁷ A presumption which is sometimes considered merely a presumption of fact,⁸ that a letter has promptly reached its destination, arises on proof that it was duly addressed and mailed, post-paid, to the addressee where he was living and received his mail.⁹ So a message shown to have been delivered to a tele-

¹ Collins v. Gilbert, 94 U. S. 753; Kidder v. Horrobbin, 72 N. Y. 169; National State Bank v. Richardson, 2 N. Y. S. 804.

² Hodgson v. Wight, 36 Me. 326; Brewer v. Knapp, 1 Pick. 332, 337.

³ Long v. Strauss, 24 N. E. Rep. 664. Payment of rent by a tenant raises a presumption that he occupied the premises. Bishop v. Howard, 2 B. & C. 100.

⁴ Patton v. Ash, 7 Serg. & R. 116, 125; Seiple v. Seiple, 25 W. N. C. 488; Gerding v. Walter, 29 Mo. 426; Kuehler v. Adler, 78 N. Y. 287; Poucher v. State, 98 id. 422.

⁵ Nay v. Curley, 113 N. Y. 575; Grey v. Grey, 47 id. 552.

⁶ Worley v. Hineman (Ind., 1893), 33 N. E. Rep. 260.

⁷ Fletcher v. Braddyle, 3 Stark. 64; New Haven Co. v. Mitchell, 15 Conn. 206. Cf. Boon v. State, 37 Minn. 426.

⁸ Oregon S. S. Co. v. Otis, 100 N. Y. 45.

⁹ Rosenthal v. Walker, 111 U. S. 185; Van Doren v. Liebman, 11 N. Y. S. 769; Jensen v. McCorkle, 154 Pa. St. 353; Briggs v. Hervey, 130 Mass. 187; McCoy v. New York, 46 Hun, 268; Bank v. McManigle, 69 Pa. St. 156; Steiner v. Ellis, 7 S. Rep. 803; Loud v. Merrill, 45 Me. 516; Austin v. Holland, 69 N. Y. 571, 576. See *contra*, Home Ins. Co. v. Maple (Ind., 1890), 27 N. E. Rep. 633; Hastings v. L. I. Co., 138 N. Y. 473. This presumption is confirmed by proof that a request to return if not

graph company will be *prima facie* presumed to have been delivered by the latter.¹

Though the courts of one state commonwealth do not take judicial notice of the statutory or common law of another state, or of a foreign country,² it will be presumed, till the contrary is shown, that the general rules of the common law of England modified by statute prevail in all states except in those such as, for example, Texas and Louisiana,³ whose jurisprudence is founded upon the Roman civil law;⁴ while so far as the statutory law is concerned, though the authorities are not harmonious, the weight of the decisions maintains the proposition that the statute law of any state will be presumed *prima facie* to be the same as that of the place of trial.⁵

delivered was attached. Hedden v. Roberts, 134 Mass. 38. If in order to obtain a record a deed must be properly stamped, it will be presumed that a deed recorded was duly stamped though the record does not show this fact. Collins v. Valleau (Iowa, 1889), 44 N. W. Rep. 904. See, also, as to certification of judgments, Bailey v. Winn (Mo., 1890), 12 S. W. Rep. 1045; Woolery v. Grayson, 110 Ind. 149. See, also, *ante*, §§ 146, 148, 149.

¹ Oregon Co. v. Otis, 100 N. Y. 451; Com. v. Jeffries, 89 Mass. 548.

² See *post*, § 242.

³ Brown v. Wright (Ark., 1893), 22 S. W. Rep. 1022.

⁴ Cooper v. Reaney, 4 Minn. 528; Lipe v. McClery, 41 Ill. App. 29; Sandidge v. Hunt, 5 S. Rep. 55; Holmes v. Broughton, 10 Wend. (N. Y.) 75; Guardians v. Greene, 5 Binn. 558; Flato v. Mulhall, 72 Mo. 522; Reese v. Harris, 27 Ala. 301; Wheaton v. Peters, 8 Pet. 658; Hydrick v. Burke, 30 Ark. 124; Hickman v. Alpaugh, 21 Cal. 225; Bollinger v. Gallagher, 142 Pa. St. 205; Cluff v. Mut. Ben. Ins. Co., 13 Allen (Mass.), 308; Mortimer v. Marder, 93 Cal.

172; Atkinson v. Atkinson, 75 La. Ann. 491; Brown v. Philada. etc. Co., 9 Fed. Rep. 185; Com. v. Kenny, 120 Mass. 387. "The common law of England can be made part of our federal system only by legislative adoption. The United States has no common law. Each state *may* have its own local customs and common law. The power of the United States is expressed in the constitution, laws and treaties. The English common law was adopted by the original thirteen colonies only so far as it suited their conditions, from which circumstances what is common law in one state is not so considered in another. The judicial decisions, the usage and customs of the respective states determine to what extent the common law has been introduced into each state." Wheaton v. Peters, 8 Pet. 658-59.

⁵ McDonald v. Mallory, 77 N. Y. 547; Brumhall v. Van Campen, 8 Minn. 13; Osborn v. Blackburn, 47 N. W. Rep. 175; St. Louis, etc. Co. v. Weaver, 35 Kan. 412; Murphy v. Collins, 121 Mass. 6; Hewitt v. Morgan, 55 N. W. Rep. 478; Atchison, etc. Co. v. Betts, 10 Colo. 431. *Con-*

With respect to foreign law, excepting the systems of jurisprudence of those countries where the English common law prevails, no presumptions are recognized; and where the question of extra-territorial law arises, the court will apply the *lex fori* in all cases where the foreign law is not pleaded and proved by the party.¹

As the principles of the law merchant are recognized and prevail in all civilized states, it will be presumed that the law of a foreign state on any matter of commerce is identical with the law of the place of trial.²

§ 231. Lawfulness — Continuity — Sanity and insanity.— It is generally presumed that the law has been obeyed and that public officials have done their duty.³ Not only are officials presumed to have observed the law which they have been sworn to execute or interpret, but private persons⁴ are also presumed, in the absence of contrary proof, in their business and social relations, to have observed the rules of law and equity and the principles of morality.⁵ So where a written instrument purports to be executed by the officers of a private corporation, it will be presumed that they possessed the power to execute it, and that its execution was actually authorized by the corporation.⁶

tra, as to foreign country. West. U. T. Co. v. Way, 83 Ala. 542. See, supporting text, Amer. Oak. L. Co. v. Standard, etc. Co. (Utah., 1893), 33 Pac. Rep. 246; Haggin v. Haggin, 35 Neb. 575; Bierhaus v. W. U. T. Co. (Ind., 1893), 34 N. E. Rep. 581.

¹ Flato v. Mulhall, 72 Mo. 522; Savage v. O'Neill, 44 N. Y. 298; Norris v. Harris, 15 Cal. 226. As to the proof of foreign laws, see § 143.

² Dubois v. Mason, 127 Mass. 37. Cf. §§ 148, 149, *ante*.

³ Sumner v. Peeble, 5 Wash. St. 471; Gridley v. College of St. Francis, 137 N. Y. 327; Broder v. Conklin (Cal., 1893), 33 Pac. Rep. 211; Eakins v. Eakins (Ky., 1893), 20 S. W. Rep. 285; Brown v. Selby, 2 Biss. 457; Nat. Harrow Co. v. Hanby, 54 Fed. Rep. 493; Francis v. Kirkpatrick Co., 52 Fed. Rep. 824; Saul v. Frame

(Tex., 1893), 22 S. W. Rep. 984. This presumption obtains only between third parties. It cannot be invoked in behalf of the officer himself. O'Brien v. McCann, 58 N. Y. 373.

⁴ Arent v. Squire, 1 Daly, 347.
⁵ Ross v. Bedell, 5 Duer, 462; People v. Pease, 27 N. Y. 45; Thompson v. Newlin, 8 Ired. Eq. 32; Roseville v. Gilbert, 24 Ill. App. 334; Fenlon v. Dempsey, 50 Hun, 131; Wheeler v. Wheeler, 2 N. Y. S. 496. It seems, however, that no presumption obtains that a physician is reasonably skillful (Columbus v. Strasner (Ind., 1893), 34 N. E. Rep. 5), or that a mere private servant has performed his duty. Bigelow v. Metro. Ry. Co., 48 Mo. App. 367. Cf. Turner v. Lord, 92 Mo. 113.

⁶ Gutzell v. Pennie, 95 Cal. 598; N. E. E. L. etc. Co. v. Farmington,

Despite the extreme liability of all human affairs to change, some presumptions exist which are based upon the relative permanency or continuity which is frequently observed to exist in certain lines of human activity. So a personal connection, relationship or state of affairs, or a person's existence once shown in evidence, will be presumed to continue unchanged as long as it is usual for a thing of its peculiar nature to endure, unless the contrary be affirmatively proved.¹ If it be shown that a corporation,² partnership,³ agency, marriage,⁴ an adulterous connection,⁵ or a similar relation existed, it is presumed that it continued to exist until its discontinuance is shown.⁶ An existing agency will be presumed to be a general agency.⁷ A person shown to have resided in a place will be presumed to have continued to do so,⁸ and a presumption of the continuance of a lawful seizin in one will obtain until it is overthrown by proof of facts inconsistent therewith.⁹

But the most important presumption based upon the continuity of human conditions is the presumption that all men

etc. Co., 84 Me. 284; *Gorder v. Platts-mouth, etc. Co.* (Neb., 1893), 54 N. W. Rep. 830. A recital in a deed that it was executed under seal will be presumed to be true though the seal, which had been affixed, has wholly disappeared. *Rensens v. Staples*, 52 Fed. Rep. 91; *Macey v. Stark*, 21 S. W. Rep. 1088 (Mo., 1893).

¹ *Scott v. Wood*, 81 Cal. 398; *Newman v. Greenville*, 7 S. Rep. 403; *Breman Bank v. Branch, etc. Co.*, 16 S. W. Rep. 209; *Redding v. Goodwin*, 44 Minn. 355 (presumption of bankruptcy); *Gernan v. Navigation Co.*, 66 Hun, 633; *Parkhurst v. Ketcham*, 6 Allen, 406; *Satchell v. Doran*, 4 Ohio St. 542, holding that a public highway shown to exist is presumed to continue.

² *People v. Man. Co.*, 9 Wend. 351.

³ *Eames v. Eames*, 41 N. H. 176.

⁴ *Gilman v. Sheets*, 43 N. W. Rep. 299.

⁵ *Smith v. Smith*, 4 Paige, 432;

Van Epps v. Van Epps, 6 Barb. 320.

⁶ 1 Greenl. Ev., § 42; *Seaman v. Ward*, 1 Hilt. 52, 55; *Haltenhof v. Haltenhof*, 44 Ill. App. 135 (desertion during divorce proceedings); *Eames v. Eames*, 41 N. H. 177; *Leport v. Todd*, 32 N. J. L. 124; *Cooper v. Dedrick*, 22 Barb. 516; *Smith v. Smith*, 4 Paige, 432.

⁷ *Sharp v. Knox*, 48 Mo. App. 169.

⁸ *Rexford v. Miller*, 49 Vt. 319; *Nixon v. Palmer*, 10 Barb. 175, 178; *Kilburn v. Bennett*, 3 Met. (Mass.) 199.

⁹ *Hollingsworth v. Walker*, 13 S. Rep. 6; *Long v. Mast*, 11 Pa. St. 189; *Babcock v. Utter*, 1 Abb. App. 27; *Stephens v. McCormick*, 5 Bush, 181; *Lind v. Lind* (Minn., 1893), 54 N. W. Rep. 934; *Alabama Land Co. v. Kyle* (Ala., 1893), 13 S. Rep. 43; *Balch v. Smith*, 4 Wash. St. 497; *Elyton L. Co. v. McElrath*, 53 Fed. Rep. 763.

are of sane mind, competent to manage their own affairs,¹ and responsible for their criminal acts. If acts be proved sufficient to establish a condition either of imbecility or lunacy as existing at any particular time, it will be presumed that the condition has continued.²

The question of the presumptions of sanity and insanity becomes of the greatest importance in the trial of criminal causes, and especially in the trial of those accused of homicide where insanity is urged as a defense. This being so, it is greatly to be regretted that the courts are not altogether harmonious as respects the amount or quality of the proof that is required to overcome the *prima facie* presumption of sanity which is said to exist in the case of every man. The modern tendency of the cases is to give the prisoner who pleads insanity as a defense to crime every opportunity to secure his acquittal on that plea if he can, by the aid of the results of modern scientific investigation into the domain of mental diseases, prove that fact to the jury. He need not prove his insanity beyond a reasonable doubt, for if he but succeed in raising a doubt in the minds of the jury on this point, then it is for the state to convince them beyond a reasonable doubt that he is sane upon all the evidence.³ The accused must prove, however, according to the majority of the cases, that "he was laboring under such a defect of reason from disease of the mind as not to know (*i. e.*, as not to have sufficient mental capacity to know) the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong."⁴

¹ *Baxter v. Abbott*, 7 Gray, 71, 83; *Delafield v. Parish*, 25 N. Y. 9; *Aikin v. Weckerly*, 19 Mich. 482; *Day v. Day*, 2 Green Ch. 549; *Cotton v. Ulmer*, 45 Ala. 378; *Perkins v. Perkins*, 39 N. H. 163; *Blackburn v. State*, 23 Ohio St. 146; *Herbert v. Berrier*, 81 Ind. 1; *Robinson v. Adams*, 62 Me. 369; *Tingley v. Cowgill*, 48 Mo. 291; *Williams v. Robinson*, 42 Vt. 678.

² *Halley v. Webster*, 21 Me. 461; *State v. Wilner*, 40 Wis. 304; *Townsend v. Townsend*, 7 Gill, 10; *Har-*

rison v. Rowan, 3 Wash. C. C. 586; *Reiter v. Miller*, 86 N. Y. 507; *Crouse v. Holman*, 19 Ind. 30; *Lilly v. Waggoner*, 27 Ill. 395.

³ See *post*, Burden of Proof in Criminal Trials, § 249, and the cases there cited.

⁴ This is the rule laid down in *McNaghten's Case* in 1843, 10 Cl. & F. 200, and followed by many cases in England and America. In that case the court said: "The jurors ought to be told in all cases that every man

This rule has been followed by the majority of the cases in America, and may now be considered to be the law as regards the amount and quality of the mental derangement which must be shown in a criminal trial to rebut the presumption of sanity.¹ Sometimes, however, the courts have departed from this test of the capacity to know the nature and moral character of the act and have laid down the broader

is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defense on the ground of insanity it must be clearly proved that at the time of the commitment of the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." Again, in *Moett v. People*, 85 N. Y. 375, 380, the court, by Earl, J., said: "The laws of God and the land are the measure of every man's act, and make it right or wrong, and it is right or wrong as it corresponds with these laws. When it is said that a prisoner must at the time of the alleged criminal act have sufficient capacity to distinguish between right and wrong with respect to such act, it is implied that he must have sufficient capacity to know whether such act is in violation of the law of God or of the land or both. It is not the duty of the trial judge to present the matter to the jury in every possible phase and in every form of language which the ingenuity of counsel can devise."

¹*Parsons v. State*, 2 S. Rep. 854; 81 Ala. 577; *State v. Hockett*, 30 N. W. Rep. 742; 70 Iowa, 442; *State v. Pagels*, 92 Mo. 300; 4 S. W. Rep. 931; *Leache v. State*, 22 Tex. App.

279; *State v. Mowry*, 15 Pac. Rep. 282; 37 Kan. 369; *Farris v. Com.* (Ky., 1890), 1 S. W. Rep. 729; *Giebel v. State*, 28 Tex. App. 151; 12 S. W. Rep. 591; *State v. Zoun* (Oreg., 1892), 30 Pac. Rep. 517; *Com. v. Gerade*, 145 Pa. St. 289; 28 W. N. C. 261; *State v. Alexander*, 30 S. C. 74; *State v. Harrison*, 15 S. E. Rep. 982; 36 W. Va. 729; *State v. Maier*, 36 W. Va. 757; *Dunn v. People*, 109 Ill. 635; *Hornish v. People* (Ill., 1893), 32 N. E. Rep. 677; *Maxwell v. State*, 89 Ala. 150; *People v. Foy*, 34 N. E. Rep. 396; 138 N. Y. 664; *Karney v. State* (Miss., 1891), 8 S. Rep. 292. For cases of homicide in which this presumption of sanity was removed, see *Reg. v. Layton*, 4 Cox C. C. 149-155; *Roswell v. State*, 63 Ala. 307; *State v. Hoyt*, 46 Conn. 330; *State v. Martin* (N. J.), 3 Cr. L. Mag. 44; *Com. v. Rogers*, 48 Mass. (7 Metc.) 500; *Armstrong v. State*, 30 Fla. 170; *Boswell v. Com.*, 20 Gratt. (Va.) 860; *State v. Starling*, 6 Jones' (N. C.) L. 366; *State v. Hurley*, 1 Houst. Cr. Cas. (Del.) 22; *King v. State*, 9 Fla. 617; *People v. McDonell*, 47 Cal. 134; *State v. Stark*, 1 Strobh. (S. C.) L. 479; *People v. Finley*, 38 Mich. 482; *Caset v. State*, 40 Ark. 511; *Kriel v. Com.*, 5 Bush (Ky.), 362; *Baldwin v. State*, 12 Mo. 223; *Loeffner v. State*, 10 Ohio St. 599; *Jamison v. People* (Ill., 1894), 34 N. E. Rep. 48; *Com. v. Lynch*, 3 Pittsb. (Pa.) 412; *Montgomery v. Com.*, 88 Ky. 509; *Flanagan v. People*, 52 N. Y. 467.

rule that though the defendant may have known or had capacity to know the difference between right and wrong in the particular case, yet, if facts are shown from which the jury may infer that he was acting under some uncontrollable impulse or influence which prevented him from making a choice between the right and wrong, the presumption of his sanity is rebutted and it becomes the duty of the jury to acquit the accused.¹

The presumption of the continuance of a given condition of mental derangement depends entirely upon the nature of the mental malady itself. Thus while in the case of congenital mental infirmity as idiocy, or habitual or fixed insanity, it may require very clear evidence to rebut the presumption, in the case of a delirium which is the result of physical disease, it is doubtful if it can be said that a legal presumption of continued insanity exists at all.² There is no presumption of law that once insane always so, but the circumstances of each case should be considered to ascertain how far the same mental condition may be presumed to exist at an earlier or later period.³

§ 232. Presumptions as to jurisdiction.—It is a general rule that a court of superior or general jurisdiction will be presumed to have acted regularly and within its powers where

¹ This is the doctrine of moral insanity as distinguished from mere mental disease *per se*, or from hallucinations or delusions constituting mania. See 3 Law Quar. Rev. 339; Taylor v. Com., 109 Pa. St. 270; Plake v. State, 121 Ind. 433; People v. Durfee, 62 Mich. 487; People v. Kerrigan, 14 Pac. Rep. 566; 73 Cal. 222, rejecting the doctrine of moral insanity. See, also, generally, State v. Reidel (Del., 1888), 14 Atl. Rep. 550; Williams v. State, 50 Ark. 511; 9 S. W. Rep. 5; Burgo v. State (Neb., 1889), 42 N. W. Rep. 701; People v. Barber, 15 N. Y. 475. Cf. State v. Jones, 50 N. H. 369; Leache v. State, 22 Tex. Cr. App., p. 279; 3 S. W. Rep. 539; Parsons v. State, 81 Ala. 577; 2 S. Rep. 854; Dacey v. People,

116 Ill. 555; 6 N. E. Rep. 165, in which the subject of emotional or moral insanity is further considered.

² Johnson v. Armstrong (Ala., 1893), 12 S. Rep. 72; Manley v. Staples (Vt., 1893), 26 Atl. Rep. 630; Prentice v. Bates, 93 Mich. 234.

³ Schouler on Wills, § 187, citing Goble v. Grant, 2 Green Ch. 629; Cartwright v. Cartwright, 1 Phill. 100; Goodheart v. Ransley, 28 Wkly. L. Bul. 227; Hix v. Whittemore, 4 Met. 545; Halley v. Webster, 21 Me. 461; Staples v. Wellington, 58 Me. 453; McMasters v. Blair, 29 Pa. St. 298; Taylor v. Cresswell, 45 Md. 422; Townsend v. Townsend, 7 Gill, 10; Castor v. Davis (Ind., 1890), 20 N. E. Rep. 110.

the record is silent and until the contrary is shown;¹ and for this reason, whenever the validity of its judgment is attacked collaterally, it will be presumed, where the record of the judgment is silent on these points, that both the subject-matter and the parties were within its jurisdiction.² If jurisdiction has once been acquired it will be presumed to continue until final judgment.³ When any fact or statement appears upon the record its correctness will be presumed,⁴ and all the necessary steps which are requisite to give the court jurisdiction will be presumed to have been taken in conformity therewith, even where the minor details appertaining thereto are not set forth in the record.⁵ Thus it will be presumed that pleadings have been properly amended or filed where amendment or filing was needed;⁶ that the rulings of the trial court

¹State v. Trounce, 5 Wash. St. 804; Ryder v. Roberts, 48 Mo. App. 132; Cape Girardeau v. Burrough, 112 Mo. 559; Galpin v. Page, 18 Wall. 350; Black v. Epperson, 40 Tex. 178; Nations v. Johnson, 24 How. (U. S.) 195; Slocum v. Prov. St. etc. Co., 10 R. I. 112. By some of the cases this presumption is based, not on the superior power of the court at common law, but upon the fact that a court has a record on which all its proceedings are inscribed. Davis v. Hudson, 29 Minn. 35.

²See §§ 152-155, *ante*; Pope v. Harrison, 16 Lea (Tenn.), 82; Doe v. Lindsey, 24 Ga. 225; Huntington v. Charlotte, 15 Vt. 46; Taylor v. Brily (Ind., 1892), 30 N. E. Rep. 369; Yaeger v. Henry, 39 Ill. App. 21; Markel v. Evans, 47 Ind. 326; Linton v. Allen, 154 Mass. 432; Emeric v. Alvaredo, 64 Cal. 529; Knox v. Bowersox, 6 Ohio Cir. Ct. 275; Carter v. State, 22 Fla. 553; United States v. Green, 6 Mackey, 562; People v. Kline, 83 Cal. 374; State v. Weaver, 101 N. C. 758.

³Housch v. People, 66 Ill. 178; Osborn v. Sutton, 108 Ind. 443.

⁴Kley v. Healy, 127 N. Y. 555;

Sickles v. Look, 93 Cal. 600; McGarvey v. Ford (N. M.), 27 Pac. Rep. 415; Kent v. Insurance Co. (N. D., 1892), 50 N. W. Rep. 85; Parish v. Railroad Co., 28 Fla. 251; Scott v. Iron Co. (Ky., 1892), 18 S. W. Rep. 1012; Traders' Bank v. Parker, 130 N. Y. 415; Louisville, etc. Co. v. Orr, 10 S. Rep. 167; 94 Ala. 602; Duncan v. State, 88 Ala. 31; Garn v. Working (Ind., 1893), 31 N. E. Rep. 821.

⁵Gridley v. College, 137 N. Y. 527; Rogers v. Burns, 27 Pa. St. 525; 2 Head, 253; Wright v. Douglass, 10 Barb. 97; Golden Gate Min. Co. v. Yuba Co., 65 Cal. 187; Wetherill v. Sullivan, 65 Pa. St. 105; Grignon's Lessee v. Astor, 2 How. (U. S.) 319. Where the party appears and defends it will be presumed that he was legally served. Martin v. Mott, 12 Wheat. 19; Bissell v. Briggs, 9 Mass. 462; Broder v. Conklin (Cal., 1893), 33 Pac. Rep. 211.

⁶Tipton v. Warner, 47 Kan. 606; Miss. etc. Co. v. Smith (Tex., 1892), 19 S. W. Rep. 509; Dove v. Commonwealth, 82 Va. 301; Evansville, etc. Co. v. Maddox (Ind., 1893), 34 N. E. Rep. 511.

are correct in the absence of exceptions thereto on the record,¹ and that the verdict was justified by the evidence if the record is silent.² But these presumptions are not conclusive.³ These presumptions are rebutted where the record shows that the court did not obtain jurisdiction because of the non-appearance, a failure to serve one of the parties, or for any other reason.⁴ Though in the case of inferior courts jurisdictional facts must appear of record, where they do so appear the court will be presumed to have properly acquired jurisdiction, and all subsequent proceedings will be presumptively regular.⁵

The rules governing the presumptions of the regularity of

¹ Adams v. Main, 29 N. E. Rep. 792; 3 Ind. App. 232; Duntun v. Keel (Ala., 1892), 10 S. Rep. 333; Brown v. Lehigh, etc. Co., 40 Ill. App. 603; Kelly v. Kelley, 80 Wis. 490; Klink v. People, 16 Colo. 467; Crawford v. Neal, 144 U. S. 585; People v. Duffee, 62 Mich. 487; Pool v. Gramling, 88 Ga. 653; Richardson v. Eureka, 96 Cal. 443; Wilson v. Nelson, 40 Ill. App. 209. See § 367 *et seq.*

² Ohio v. Sweeney, 43 La. Ann. 1073; Atchison, etc. Co. v. Howard, C. C. A. 229; Daly v. Wise, 132 N. Y. 306.

³ The correct view is not that the law presumes a record is always correct, but if on its face it is complete and regular, the party producing it is not compelled to prove it until its falsity is shown. Whart. on Ev., § 1302.

⁴ Gray v. Hawes, 8 Cal. 562; Murray v. Murray, 6 Oreg. 17; Baker v. Chapline, 12 Iowa, 204; Kilgour v. Gockley, 83 Ill. 109. The correctness of a return of personal service may be contradicted by parol. Zepp v. Hager, 70 Ill. 223.

⁵ Lemert v. Shafer (Ind., 1893), 31 N. E. Rep. 1128; Church v. Crossman, 49 Iowa, 444; Brown v. Wood, 17 Mass. 68; Smith v. Engle, 44 Iowa, 265; Reeves v. Townsend, 2 Zab. (N. J.) 39. "Presumptions as to the

judgments of superior courts only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point; and it will not be presumed that there was other or different evidence or that the fact was otherwise than as averred. Were this not so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face. The answer to the attack would always be that notwithstanding the evidence or the averment the necessary facts to support the judgment are presumed. These presumptions are also limited to jurisdiction over persons within the territorial limits of the courts, who can be reached by their process, and also to proceedings which are in accordance with the course of the common law." Bank of United States v. Dandridge, 12 Wheat. 69, 70.

judicial proceedings as above stated are subject to some limitations as respects superior courts exercising special statutory powers. Where the statutory or extraordinary judicial powers are to be exercised according to the usual common-law or chancery proceedings, the above *prima facie* presumptions of jurisdiction and of the conclusiveness of the judgment will obtain. When, however, judicial powers are to be exercised summarily or in a special manner not in conformity with the common law, no presumptions will be created, and the facts necessary to give jurisdiction must be shown by the record before a judgment or decree rendered in such statutory proceedings can be sustained.¹

A person to whom a matter is submitted for arbitration must strictly confine himself in making his award within the limits of the submission, and if he shall exceed the authority delegated to him the award will be void. A presumption of law always exists that he has not exceeded his authority as arbitrator, and the burden of proof is upon the person seeking to set aside the award.²

§ 233. Presumptions of life, death and survivorship.—A man is presumed to be alive until his death is shown.³ If a man is absent and is not heard from for seven years by those who would naturally have heard from him if he were alive, he will be presumed to be dead.⁴ A failure to hear

¹ Haywood v. Collins, 60 Ill. 328; Firman, 29 Ill. 90; Hodges v. Hodges, State v. Trounce. (Wash., 1893), 32 9 Mass. 320; Lamphire v. Cowan, 39 Pac. Rep. 750; Harvey v. Tyler, 2 Vt. 420; Sheffield v. Clark, 73 Ga. 92. Wall. (U. S.) 328; Umbarger v. ³ In re Hall, 1 Wall. Jr. (U. S.) 85; Chaboya, 49 Cal. 525; Gray v. Steamboat, 6 Wis. 59; Prentiss v. Parks, 65 Me 559; Galpin v. Page, 18 Wall. 350; Johnson v. Kettler, 84 Ill. 315; Thatcher v. Powell, 6 Wheat. 119; Clark v. Thompson, 47 Ill. 25; Windsor v. McVeigh, 93 U. S. 274; Kansas, etc. Co. v. Campbell, 62 Mo. 585; Eaton v. Badger, 33 N. H. 228.

² Hayes v. Foscoll, 31 Me. 112; 6 Bush (Ky.), 480.

Ebert v. Ebert, 5 Md. 353; Burns v. Hendrix, 54 Ala. 78; Byers v. Van Deusen, 5 Wend. 268; Richardson v. Huggins, 23 N. H. 106; Blair v. Wallace, 21 Cal. 317; Hubbard v. Mathews v. Simmons, 49 Ark. 468; French v. McGinniss, 69 Tex. 129; Stockbridge v. Stockbridge, 145 Mass. 517; Badeau v. McKenny, 7

from a person who is absent but who had a fixed abode is not enough to raise this presumption unless inquiry had been made for him in the place where he was known to be located. In some cases he will be presumed to have died at the end of the seven-year period,¹ though as a general rule the date of his death should be left to the jury to decide on all the circumstances.² If the absence is accompanied by other facts, a person's death may be presumed from absence lasting a much shorter period. Thus, where a person who is absent was physically infirm from old age,³ or if he had attempted suicide,⁴ or if he had sailed in a ship which was long overdue,⁵ and particularly if, the vessel not having been spoken, the insurance had been paid,⁶ his death would be presumed after a shorter period.⁷

So far as any presumption that a person left issue is con-

Mackey, 268; Crawford v. Elliott, 1 Houst. (Del.) 467; In re Spencely (1892), Prob. 142; Hoyt v. Newbold, 45 N. J. L. 219; Tilly v. Tilly, 2 Bland Ch. (Md.) 444; Adams v. Jones, 39 Ga. 508; Spears v. Burton, 31 Miss. 547; N. C. University v. Harrison, 90 N. C. 385; Hancock v. Am. L. I. Co., 62 Mo. 26; Thomas v. Thomas, 16 Neb. 555; Winship v. O'Conner, 42 N. H. 841; Holmes v. Johnson, 42 Pa. St. 149; Wambaugh v. Schenck, 1 Penn. (N. J.) 229; Stinchfield v. Emerson, 52 Me. 465; Whitney v. Nicoll, 46 Ill. 230.

¹ Smith v. Knowlton, 11 N. H. 191; Montgomery v. Bevans, 1 Sawy. C. C. 653; Forsuith v. State, 21 N. H. 424; Clarke v. Canfield, 2 McCart. (N. J.) 119; Davie v. Briggs, 7 Otto, 628; Eagle v. Emmett, 4 Bradf. (N. Y.) 117; Rockland v. Morrill, 71 Me. 455; Young v. Heffner, 36 Ohio St. 232; Packet v. State, 1 Sneed (Tenn.), 355; Hancock v. Insurance Co., 62 Mo. 26.

² Johnson v. Merthen, 80 Me. 115; Smith v. Knowlton, 11 N. H. 191; Burr v. Sim, 4 Whart. 150; Bradley v. Bradley, 4 id. 173; Whiteley v. In-

surance Co., 72 Wis. 170; 39 N. W. Rep. 369; Henderson v. Benar (Ky., 1890), 11 S. W. Rep. 809; In re Tobin, 4 N. Y. S. 59; Waite v. Coaracy, 45 Minn. 159; Cambreling v. Purton, 58 Hun, 610; 125 N. Y. 610; Davie v. Briggs, 97 U. S. 628; Hancock v. Insurance Co., 62 Mo. 26.

³ In re Bucknam's Will, 5 N. Y. S. 565. In this case the party was absent and unheard from a few months only.

⁴ In re Ketchum, 5 N. Y. S. 566.

⁵ Johnson v. Merithew, 80 Me. 115; Stewart's Will, 1 Con. Sur. 86.

⁶ Sprigg v. Moale, 28 Md. 497.

⁷ Cox v. Ellsworth, 26 N. W. Rep. (Neb.) 460; Johnson v. Johnson, 114 Ill. 611; Lancaster v. Wash. I. Co., 62 Mo. 121; Stouvenal v. Stephens, 2 Daly (N. Y.), 319; Sheldon v. Ferris, 45 Barb. (N. Y.) 124; Gerry v. Post, 13 How. Pr. (N. Y.) 118; State v. Moore, 11 Ired. L. (N. C.) 160; Tisdale v. Insurance Co., 26 Iowa, 170; Boyd v. N. E. Ins. Co., 3 La. Ann. 848; Davie v. Briggs, 7 Otto, 628; Loring v. Steineman, 1 Metc. (Mass.) 204.

cerned, it has been held that when he was unmarried when last heard from no presumption will arise that upon his death he left any surviving issue,¹ widow² or heirs.³ In some of the states statutory provisions exist by which the presumption of death after seven years' absence from the state is made conclusive if there is no proof that the absentee is alive. Such statutes do not exclude presumption of death in a case where it is unknown whether the person has left the state, and in such cases the common-law presumption applies.⁴ The presumption of death arising from absence from one's domicile may be rebutted by evidence of a general report that the missing person is alive and is domiciled at some foreign place,⁵ and *a fortiori* by direct proof that he is alive.⁶ On the other hand, a person's death cannot be proved by evidence of a general report that he is dead, prevalent in the neighborhood where he was last known to reside, such evidence being hearsay and incompetent.⁷

The question of a presumption of survivorship, in cases involving the succession of estates, has been much discussed. In an early case in which a father, having bequeathed legacies to his children, perished with one of the latter in a shipwreck, the court denied that any presumption for or against survivorship could be entertained, and directed the issue to be submitted to a jury.⁸ The English ecclesiastical court adopted the presumption that both parties died simultaneously, and that consequently there was no presumption of survivorship.⁹

¹ *Sprigg v. Moale*, 28 Md. 497; *Chapman v. Kimball*, 84 Me. 389; *In re Taylor*, 66 Hun, 626; *In re Webb*, I. R. 5 Eq. 235; *Mullaly v. Walsh*, I. R. 6 C. L. 314; *Doe v. Griffin*, 15 East, 293; *In re Hanby*, 25 W. R. 427.

² *In re Westbrooke*, W. N. 1873, p. 167; *Rowe v. Hasland*, 1 W. Bl. 404.

³ *Bank v. Board*, 5 S. W. Rep. 735, 739, 742; *Ferry v. Sampson*, 112 N. Y. 415. But a presumption of issue arises where the absentee was married when last heard from. *Faulkner v. Williman* (Ky.), 16 S. W. Rep. 352; *Harvey v. Thornton*, 14 Ill. 217.

⁴ *Louisville v. Board*, 83 Ky. 219.

⁵ *Dowd v. Watson*, 105 N. C. 476.

⁶ *Flynn v. Coffee*, 12 Allen (Mass.), 133. *Cf.* *Roderigues v. Bank*, 63 N. Y. 460; *Wentworth v. Wentworth*, 71 Me. 72; *Bailey v. Bailey*, 36 Mich. 185; *Norris v. Edwards*, 90 N. C. 382.

⁷ *Johnson v. Johnson*, 114 Ill. 611; *Scott v. Ratcliffe*, 5 Pet. 81; *State v. Wright*, 70 Iowa, 152; *id.* 759; *Milfree v. State*, 13 Tex. App. 340.

⁸ 1 Greenl. on Ev., § 30; *Mason v. Mason*, 1 Mer. 308.

⁹ *Wright v. Samuda*, 2 Phil. 266, 277; *Taylor v. Diplock*, 2 *id.* 261, 273, 280; *Selwyn's Case*, 3 Hagg. 748, cited in 1 Greenl. on Ev., § 40.

The modern rule seems well settled that, in the absence of statutory provision regulating this matter,¹ where several persons perish in the same calamity, no presumption exists from age or sex that any of them survived the others or that all died at the same moment;² but that in any event the question of survivorship is to be decided, like any other question of fact, upon all the circumstances of the case; as, for example, the character of the disaster and the age, physical condition, sex and manner of death of those who perished;³ the supposed superior strength (from sex or age) being a circumstance proper to be taken into consideration, but not enough alone to create any presumption. The burden of proof of establishing survivorship is said to be on him who claims through a survivorship.⁴

§ 234. **Legitimacy — Innocence — Malice.**— In England the issue of husband and wife living together was conclusively presumed to be legitimate, and this was true though the wife had been shown to be unfaithful;⁵ though where the parties did not cohabit at the date of the conception the presumption was rebuttable.⁶ It may now be laid down as a general rule that the presumption of legitimacy of a child born during the existence of a marriage is not conclusive,⁷ even where there is a valid marriage and where the parties continue to cohabit.⁸

¹ See Civil Code of Louisiana, arts. 930-933; California Code C. P., § 1963; *Hollister v. Cordero*, 76 Cal. 649; 18 Pac. Rep. 855.

² *In re Alston* (1892), Prob. 142; *Underwood v. Wing*, 19 Beav. 459; 4 De G., M. & G. 633, 657; *Wing v. Angrave*, 8 H. L. Cas. 183, 198; *Johnson v. Merrithew*, 80 Me. 111; 13 Atl. Rep. 132; *Kans. etc. Co. v. Miller*, 2 Colo. Ter. 442; *Stinde v. Ridgway*, 55 How. Pr. 301; *Cowman v. Rogers*, 73 Md. 403; *Stinde v. Goodrich*, 3 Redf. Sur. 87; *Robinson v. Gallier*, 2 Wood C. C. 178; *Corye v. Leach*, 8 Met. 371; *In re Ridgway*, 4 Redf. 226; *Fuller v. Linzee*, 135 Mass. 468.

³ *In re Ehle's Will*, 41 N. W. Rep. 627; 73 Wis. 445.

⁴ See, also, *Russell v. Hallett*, 23 Kan. 276; *Coye v. Leach*, 8 Metc. (Mass.) 371; *Smith v. Croom*, 7 Fla. 144; *Newell v. Nichols*, 12 Hun (N. Y.), 644; 75 N. Y. 78.

⁵ *St. George v. St. Margaret*, 1 Salk. 123; *Banbury Peerage Case*, 1 Sim. & Stu. 153.

⁶ *Morris v. Davis*, 5 C. & Fin. 163.

⁷ *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375; *Cross v. Cross*, 3 Paige Ch. 139.

⁸ *Bullock v. Knox* (Ala., 1893). 10 S. Rep. 339; *Cross v. Cross*, 3 Paige, 139; *Sullivan v. Kelly*, 3 Allen (Mass.), 148; *Dean v. State*, 29 Ind. 483; *Pittsford v. Chittenden*, 58 Vt. 51; *Strode v. MacGowan*, 2 Bush (Ky.), 621; *Herring v. Goodson*, 43 Miss. 392; *Caujolle v. Ferrie*, 26

A fortiori if the fact of non-access, caused by the prolonged absence of the husband from the country, be established, the presumption of legitimacy is supplanted by an irresistible conclusion that a child born to the wife is illegitimate.¹ So, while the marriage may legitimize a child, there is no presumption that a man who marries the mother of a bastard is its father.² But a marriage once proved, the law raises a strong presumption that it is a legal one, which can only be rebutted by the clearest proof.³

The rule that every one is presumed to be innocent⁴ until his guilt is shown is based on the fact that men generally observe the rules of the criminal law and upon the impossibility of obtaining and the injustice of requiring affirmative proof that the accused has done so. This presumption, which is always rebuttable,⁵ but which, if it is not rebutted, accompanies the accused through the trial, is merely stating in a concise form the well-recognized rule of law that any party, whether it be the state, or an individual seeking redress for a civil injury,

Barb. 177; *State v. Pettaway*, 3 Hawks (S. C.), 523; *Tate v. Penne*, 7 Mart. (La.) 548; *Dean v. State*, 29 Ind. 483.

¹ *Pittsford v. Chittenden*, 58 Vt. 51; *Cross v. Cross*, 3 Paige, 139; *In re Say and Sele*, 1 H. L. Cas. 507. Sexual intercourse is presumed from access (*Head v. Head*, 1 Sim. & Stu. 150); and if access is shown no evidence is admissible to rebut the presumption of intercourse except direct evidence that it did not take place. If the husband had access, evidence of an adulterous intercourse alone, it has been held, is not relevant to prove illegitimacy in view of the strong presumption of legitimacy. Abb., *Trial Evidence*, p. 89.

² *McDonald's Appeal*, 30 W. N. C. 176.

³ *Boulden v. McIntire*, 119 Ind. 574; *Coal R. C. Co. v. Jones*, 127 Ill. 379; *State v. Brecht*, 41 Minn. 50.

⁴ *Case v. Case*, 17 Cal. 598; *McEwen v. Portland*, 1 Oreg. 300; *Gal-*

laher v. State, 28 Tex. App. 247; *Edwards v. State*, 21 Ark. 512; *Johnson v. State* (Tex., 1893), 20 S. W. Rep. 368; *People v. Graney*, 91 Mich. 646.

⁵ *Van Peet v. McGraw*, 4 N. Y. 110; *United States v. Heath*, 20 D. C. 372; *People v. Pallister*, 38 N. Y. 601; *Gardner v. State* (N. J., 1893), 26 Atl. Rep. 30; *Woodruff v. State* (Fla., 1893), 12 S. Rep. 653; *Reid v. State*, 50 Ga. 556; *Barcus v. State*, 49 Miss. 17; *McDaniell v. State*, 76 Ala. 1; *People v. Bush*, 71 Cal. 602; *Dixon v. State*, 13 Fla. 636; *Murphy v. People*, 37 Ill. 447; *State v. Vincent*, 24 Iowa, 570; *State v. Knight*, 43 Me. 11; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; *State v. Alexander*, 66 Mo. 148; *State v. Byers*, 100 N. C. 512; *Perry v. State*, 44 Tex. 473; *Hill's Case*, 2 Gratt. (Va.) 594; *People v. Coughlin* (Mich.), 32 N. W. Rep. 905; *Goodal v. State*, 1 Oreg. 333.

who seeks the aid of a court of law, has the burden of proof to show affirmatively the existence or non-existence of the facts he affirms or denies. Thus, in the case of a trial for the crime of seduction, the plaintiff's previous chastity, being material, must be proved.¹ The character and strength of the presumption of innocence demand that, even where wrongdoing can be proved by negative evidence alone, such proof must be given by the party alleging the wrong, contrary to the general rule, by which the burden of proof is cast on the one maintaining the affirmative.²

So where both the presumption of the continuance of life and the presumption of innocence are involved, the latter will prevail, and the existence of the person will have to be shown.³

Every man possessed of a sound mind is presumed to intend and contemplate the necessary and even the probable natural consequences of his deliberate acts.⁴ The presumption may in some cases be conclusive, as where the consequences necessarily follow the act. This occurs, for example, where a person deliberately points and fires a pistol at a vital part of another person's body. Here, if the latter is killed, the former cannot be heard to say that he did not intend to kill him. The intention to kill is conclusively presumed. If the consequences do not naturally follow the act, that is if they only probably follow it, the presumption is rebuttable.⁵ A person who knowingly and voluntarily signs an instrument is *prima facie* presumed to have read it or to have otherwise informed himself as to its contents.⁶ But this presumption is always rebuttable by proving that the party was deceived through

¹ Com. v. Whitaker, 131 Mass. 224; State v. Wells, 48 Iowa, 671.

² Quin v. State, 46 Ind. 459; Plano Co. v. Root (N. D., 1893), 54 N. W. Rep. 924; Cook v. Tavenor, 41 Ill. App. 642.

³ Com. v. McGrath, 140 Mass. 296; Spears v. Burton, 31 Miss. 547; Klein v. Landman, 29 Mo. 259; Sharp v. Johnson, 22 Ark. 75. The accused is entitled to a separate and distinct instruction that his innocence is presumed until his guilt is proved. An instruction that he

must be proven guilty beyond a reasonable doubt is not enough alone, for the maxim of law regarding reasonable doubt is by no means synonymous with the proposition that a man is presumed innocent until his guilt is shown. People v. Van Houter, 38 Hun, 168; Barker v. State, 48 Ind. 163.

⁴ Reynolds v. United States, 98 U. S. 167.

⁵ In re Bringer, 7 Blatch. 268.

⁶ Harris v. Story, 2 E. D. Smith, —.

his own ignorance or the fraud of others, or that he signed the document by mistake or under duress.¹

In the case of the deliberate use of a deadly weapon causing death, when it is shown that the killing was done by the defendant and no other evidence is offered on either side, malice will be presumed, and the act will constitute murder.² If, as is usually the case, other circumstances are presented in the evidence in connection with the killing, which is admitted or proved and which is not claimed to be excusable, then it is for the jury to say, upon all the evidence, whether malice was present or not, and this question they must decide upon all the facts in the case.³ In other words, a rebuttable presumption of malice arises as soon as the homicide is proved. This may become a conclusive presumption binding on the jury in case no defense is made. On the other hand, the presumption may be rebutted by other evidence of the state, while if such is not the case the accused may offer evidence to show that he did the killing in self-defense or while insane and thus remove the presumption of malice.

As regards minor crimes of which a criminal or malicious

¹ Lake v. Ranney, 33 Barb. (N. Y.) 50, 68.

² Com. v. Hawkins, 3 Gray, 463; Lewis v. State (Ga., 1893), 15 S. E. Rep. 697; Fritch v. State (Ga., 1893), 16 S. E. Rep. 102. Implied malice, *i. e.*, a presumption of malice, exists where mischief is intentionally done without just cause or excuse. Darry v. People, 10 N. Y. 138.

³ State v. Patterson, 45 Vt. 308; State v. Ariel (S. C., 1893), 16 S. E. Rep. 779; Young v. State (Ala., 1892), 10 S. E. Rep. 913; Hart v. State, 17 S. W. Rep. 421; 21 Tex. App. 163; Hornsby v. State (Ala., 1892), 10 S. E. Rep. 522; State v. Carver (Oreg., 1892), 30 Pac. Rep. 315; People v. Knapp, 71 Cal. 1; People v. Tidwell, 4 Utah, 506; Powell v. State, 28 Tex. App. 393; People v. Odell, 46 N. W. Rep. 601; 1 Dak. 197; State v. Whitson, 111 N. C. 695; Hawthorne v.

State, 58 Miss. 778; State v. Swayze, 30 La. Ann. 1323; State v. Smith, 77 N. C. 488; State v. Knight, 43 Me. 12; Stokes v. People, 53 N. Y. 164; Thomas v. People, 67 id. 218. *Cf.* Lovett v. State, 30 Fla. 142. "Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been with malice aforethought. It is not necessary to prove that any special or express hatred or malice was entertained by the accused toward the deceased. It is sufficient to prove that the act was done with deliberate intent as distinct from an act done under the sudden impulse of passion in the heat of blood and without previous malice." United States v. Guiteau, 10 Fed. Rep. 162, 165.

motive or intent is a constituent part, no presumption of malice is created where no statutory provision exists making the act criminal *per se*. If a malicious intent or motive is necessary it will have to be proved by the party on whom is cast the burden of proving the essential elements of the transaction in litigation. But this rule does not of course require direct evidence of malice, though such evidence may often be easy to procure in the shape of the express declarations of the accused. It is usually sufficient if facts are shown which evince a malevolent, or spiteful, or reckless disposition, and from these facts the jury may decide as a presumption or inference of fact that malice existed in the case.¹

¹“Thus in malicious prosecutions the term is quite comprehensive and includes many phases of wrong motive and conduct. There may be ill-will, malevolence, spite, a spirit of revenge or a purpose to injure without cause, but it is not necessary there should be. If the prosecution is wilful, wanton or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy, it is malicious.” *Hamilton v. Smith*, 30 Mich. 229.

CHAPTER XVIII.

JUDICIAL NOTICE.

§ 236. Judicial notice.

237. Matter of common knowledge.

238. Historical facts.

239. Geographical facts.

240. Political facts — Elections.

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§ 242. Common and statutory law —

Municipal ordinances and local and foreign laws.

243. Foreign nations, seals and acts.

244. Terms of court, records, rules of practice and judicial proceedings.

§ 236. **Judicial notice.**— The doctrine of judicial notice, *i. e.*, the knowledge which a court or judge will take officially of the truth of certain classes of facts without requiring proof thereof to be offered, is based upon the necessity for a speedy and inexpensive administration of justice. The time of the courts should not be taken up, nor should the parties to litigation be put to needless expense in taking evidence to prove facts which are merely collateral to the point in issue and which are within the knowledge of all persons of average education and intelligence. Of such facts the courts will take judicial notice. The primary effect of judicial notice is to dispense with the proof of some fact. To the extent that this is done the power of the jury as triers of fact is limited and circumscribed, and the power of the court to decide upon the existence of a fact as a matter of law, and by its decision to bind the jury, is correspondingly enlarged. To permit the court to take judicial notice of obvious or familiar facts is equivalent to enunciating a rule of law that such facts are to be considered by the jury as conclusively proved and as obligatory on them. This view of the matter is confirmed by the consistent practice of the courts in refusing not only to permit the introduction of evidence to prove the fact, but of evidence to disprove its truth as well.

But the amount of information which is required to constitute a man of average or ordinary education and intelligence

will vary greatly. Many facts may be notorious in one section of a large country which would not be known to well-informed persons in another. The general rules, therefore, in regard to the facts which the courts will notice judicially are sometimes modified by the circumstances of the particular case to which it is sought to apply them.¹

§ 237. **Matter of common knowledge.**—The courts will take judicial notice of the meaning of English words and phrases,² abbreviations,³ and of legal expressions in common use.⁴ So, courts will take judicial notice of the recurrence of public holidays;⁵ of the natural and artificial subdivisions of time;⁶ of the coincidence of the days of the month and week;⁷ of the incidents of railroad travel;⁸ of the use of the telephone as a means of communication;⁹ of billiard tables for gaming purposes;¹⁰ of the nature and value of the circulating medium

¹ "Courts should exercise this power with caution; care must be taken that the requisite notoriety exists, and every reasonable doubt should be promptly resolved in the negative." Swayne, J., in *Browne v. Piper*, 91 U. S. 37.

² *Lohman v. State*, 81 Ind. 151; *Power v. Boudle* (N. D., 1893), 54 N. W. Rep. 404; *Baily v. Kalamazoo P. Co.*, 40 Mich. 251; *Elrod v. Alexandra*, 4 Heisk. 342 (meaning of "contraband"); *Barker v. State*, 12 Tex. 273; *Fullenwider v. Fullenwider*, 53 Mo. 439; *Hill v. State*, 43 Ill. 177; *State v. Hambleton*, 22 Mo. 452; *Com. v. Kneeland*, 20 Pick. (Mass.) 239.

³ *Brown v. Piper*, 91 U. S. 37; *Moseley v. Martin*, 37 Ala. 216; *Wasson v. Bank*, 107 Ind. 206; *Weaver v. McElbrenan*, 13 Mo. 89; *Stephen v. State*, 11 Ga. 225; *United States v. Keefer*, 59 Ind. 263 ("C. O. D."). *Contra*, *Johnston v. Roberts*, 31 Md. 476 (abbreviations used by printers and newspaper publishers); *Ellis v. Park*, 8 Tex. 205; *Accola v. Railroad Co.*, 70 Iowa, 185; *Hulbert v. Carver*, 37 Barb. 62; *Collender v. Dinsmore*,

55 N. Y. 200; *Russell v. Martin*, 15 Tex. 238; *McNichols v. Pacific Ex. Co.*, 12 Mo. App. 401. See *ante*, § 218.

⁴ *Eureka Vinegar Co. v. Gazette*, 35 Fed. Rep. 570; *Com. v. Kneeland*, 20 Pick. 239; *Hoare v. Silverlock*, 12 Jur. 695; *Lenahan v. People*, 5 T. & C. 265; *South, etc. Co. v. Jeffries*, 40 Mo. App. 360; *Slingman v. Fiedler*, 3 Mo. App. 577; *Ward v. State*, 22 Ala. 16; *Sterne v. State*, 20 Ala. 43. ⁵ *Mechanics' Bank v. Gibson*, 7 Wend. 460; *Rice v. Mead*, 22 How. Pr. 440.

⁶ *Upinton v. Carrington*, 69 Hun, 320.

⁷ *Swales v. Grubb*, 126 Ind. 106; *Brennan v. Voght* (Ala., 1893), 11 S. Rep. 893; *Wilson v. Von Leer*, 137 Pa. St. 371; *Banks v. Kingsley*, 84 Me. 111; *Ecker v. Bank*, 64 Md. 292; *Alman v. Owens*, 31 Ala. 167; *Phila. R. Co. v. Lehman*, 56 Md. 209; *McIntosh v. Lee*, 57 Iowa, 356.

⁸ *Downey v. Hendrie*, 46 Mich. 498.

⁹ *Globe Printing Co. v. Stahle*, 23 Mo. App. 451.

¹⁰ *State v. Price*, 12 Gill & J. 260.

irrespective of its legal-tender character;¹ of legal weights and measures;² and that a litigant is an alien enemy.³ But the value of foreign currency unless fixed by act of congress,⁴ of a particular commodity,⁵ or of a person's services;⁶ the rates of exchange between cities;⁷ that "policy" is a game of chance;⁸ local rules for the measurement of grain;⁹ the habitual use¹⁰ and location of city streets and plats,¹¹ and other similar matters of limited and local notoriety, must be affirmatively shown.¹²

It has been held that though courts will take judicial notice of the natural expectation of life, as it is shown by mortality tables,¹³ they will not notice the present value of a life insurance policy which is ascertainable only after an intricate computation and the consideration of extrinsic circumstances.¹⁴

Facts of natural and uniform recurrence, such as the return of the seasons,¹⁵ the planting,¹⁶ growth, condition¹⁷ and matu-

¹ Lampton v. Haggard, 3 Mon. 146; Gady v. State, 83 Ala. 51; State v. Grant, 55 Ala. 201 (coin); Bank v. Meagher, 33 Ala. 622; Perritt, v. Couch, 5 Bush, 201 (value of United States treasury notes).

² Pecks v. Simis, 22 N. E. Rep. 313.

³ Ince v. Beekman, 16 La. Ann. 352. The federal courts will take notice of the organization and existence of national banks. United States v. Williams, 4 Biss. 302.

⁴ Kermott v. Ayer, 11 Mich. 181.

⁵ Cook v. Decker, 63 Mo. 328.

⁶ Pearson v. Darrington, 32 Ala. 227.

⁷ Lowe v. Bliss, 24 Ill. 168.

⁸ State v. Selner, 17 Mo. App. 39.

⁹ South, etc. Co. v. Wood, 74 Ala. 449.

¹⁰ Cleveland v. Newsom, 45 Mich. 62.

¹¹ Pennsylvania R. Co. v. Frana, 13 Ill. App. 91; Allen v. Scharringhausen, 8 Mo. App. 229; Cicotte v. Cruciaux, 52 Mich. 227.

¹² Longes v. Kennedy, 2 Bibb (Ky.), 607 (local custom); Russell v. Hoyt,

4 Mont. 412; Bell v. State, 1 Tex. App. 81 (location of hotels); Tison v. Smith, 8 Tex. 147; Wilcox v. Jackson, 109 Ill. 261; Perkins v. Rogers, 35 Ind. 124; St. Louis, etc. Co. v. Insurance Co., 33 Mo. App. 348; Richards v. Knight (Iowa, 1892), 42 N. W. Rep. 584 (maturity of crops); Endere v. McDonald (Ind., 1893), 31 N. E. Rep. 1056; Chicago, etc. Co. v. Champion, 33 id. 874; Bradford v. Floyd, 80 Mo. 207.

¹³ Kans. etc. Co. v. Phillips (Ala., 1893), 13 S. Rep. 65; Abell v. Pa. M. Ins. Co., 18 W. Va. 400; Gordon v. Tweedy, 74 Ala. 232.

¹⁴ Price v. Conn. M. L. Ins. Co., 48 Mo. App. 281.

¹⁵ Floyd v. Ricks, 14 Ark. 286, 292; 58 Am. Dec. 374; Raridan v. Railroad, 69 Iowa, 527; Patterson v. McCausland, 3 Bland (Md.), 69; Tomlinson v. Greenfield, 31 Ark. 557; Hunter v. New York, O. & W. R. R. Co., 116 N. Y. 622.

¹⁶ Wetzel v. Kelly, 83 Ala. 440; Loeb v. Richardson, 74 Ala. 311.

¹⁷ Ross v. Boswell, 60 Ind. 235.

riety of crops,¹ and other natural phenomena which are notorious and with which the majority of fairly well educated persons are presumed to be conversant, need not be proved.

§ 238. **Historical facts.**—Important facts of history of general and public notoriety which have exerted an influence on the development of affairs affecting either the welfare of the whole people or reacting upon the forms of the constitution and government will be noticed judicially,² though it has been held advisable, if not actually necessary, to call the court's attention to the facts involved.³ Thus, in America, the courts will not require proof that at a given period the nation was engaged in foreign⁴ or civil⁵ war, or that the latter was widespread and involved particular states or sections.⁶ So, too, it has been held that the abolition of slavery,⁷ or the nature⁸ or extinguishment of Indian titles, need not be shown.⁹

As a part of the sum of historical knowledge in the possession of the court, notice will be taken that during and after the civil war the operation of the civil law was suspended;¹⁰ that an order of a military commander was law;¹¹ that gold was not in circulation, but that in all parts of the country a paper currency was in use,¹² with reference to which contracts were made, and whose value was greatly depreciated.¹³

¹ Garth v. Caldwell, 72 Mo. 622; Dixon v. Niccolls, 39 Ill. 373; Tomlinson v. Greenfreed, 31 Ark. 557; Gordon v. Tweedy, 74 Ala. 232; Mahony v. Aurecocha, 51 Cal. 429. *Contra*, Gove v. Downer, 59 Vt. 139.

² Foscue v. Lyon, 55 N. Y. 621; Magie v. Chadoine, 30 Tex. 644; Smith v. Speed, 50 Ala. 276; Payner v. Treadwell, 16 Cal. 220; Harris v. Herman, 78 Mo. 623; Simmons v. Trumbo, 9 W. Va. 358; Prince v. Skellin, 71 Me. 361; Williams v. State, 64 Ind. 553; McKinnon v. Bliss, 21 N. Y. 206; Ashley v. Martin, 50 Ala. 537; Colloway v. Cassart, 45 Ark. 41; Yehn Jim v. Territory, 1 Wash. 63 (Indian war).

³ McKinnon v. Bliss, 21 N. Y. 206.

⁴ Ogden v. Lund, 11 Tex. 688.

⁵ Perkins v. Rogers, 35 Ind. 124; Brooke v. Filer, 35 Ind. 403; Worcester v. Cheney, 94 Ill. 430; Swenerton v. Columbian, 37 N. Y. 174.

⁶ Jeffries v. Jeffries, 39 Ala. 655 (martial law); Hix v. Hix, 25 W. Va. 481 (extent of Confederate lines); Dryden v. Stephens, 19 id. 1; United States v. Greathouse, 2 Abb. (U. S.) 364. *Contra*, Kelly v. Story, 6 Heisk. 202.

⁷ Ferdinand v. State, 39 Ala. 706.

⁸ United States v. Lucero, 1 N. M. 422.

⁹ People v. Snyder, 41 N. Y. 397.

¹⁰ Killebrew v. Murphy, 3 Heisk. 546.

¹¹ Gates v. Johnson, 36 Tex. 144.

¹² Morris v. Morris, 58 Ala. 443; United States v. American, 1 Woolw.

¹³ Ashley v. Martin, 50 Ala. 537. See cases in last note.

So, generally, any minor incident which forms a part of some greater event, or which is a factor in bringing about a condition of affairs which will be judicially noticed, need not be proved.¹ Thus, it has been held that the agreement of William Penn with Lord Baltimore, fixing the boundaries between the provinces of Maryland and Pennsylvania,² and the details of the history of Indian tribes resident in New York,³ form a part of the history of these states and need not be shown in their courts.⁴

§ 239. **Geographical facts.**— Courts are bound to notice the extent and subdivisions of the territory over which the government of which they are a part exercises its functions. Thus, courts will take notice of the existence and location of the legal divisions of the state, as towns and counties,⁵ and of the representative districts into which a state is divided.⁶ But

217; *Hart v. State*, 55 Ind. 599; *Simmons v. Trumbo*, 9 W. Va. 358; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167; *Harvey v. Walden*, 23 La. Ann. 163; *Riddle v. Hill*, 51 Ala. 224.

¹ *Schooner Mersey*, Blatchf. Prize Cas. 187; *Williams v. State*, 67 Ga. 260; *East Tenn. Iron Co. v. Gaskell*, 2 Lea, 742 (suspension of statute of limitation); *Turner v. Patton*, 49 Ala. 406; *Humphreys v. Burnside*, 4 Bush, 215; *Hix v. Hix*, 25 W. Va. 481; *Rice v. Shook*, 27 Ark. 137; *Conger v. Weaver*, 6 Cal. 548; *Dobbin v. Bryan*, 5 Tex. 267 (opening of land office); *Lamb v. Davenport*, 1 Sawy. (U. S.) 609 (facts pertaining to the settlement of Oregon); *De Celis v. United States*, 13 Ct. Cl. 117; *Conger v. Weaver*, 6 Cal. 548; *Irwin v. Phillips*, 5 Cal. 140; *Russell v. Jackson*, 22 Wend. 276 (facts of pedigree in *Debrett's Peerage*).

² *Thomas v. Stigers*, 5 Pa. St. 480.

³ *Howard v. Moot*, 64 N. Y. 262.

⁴ The court may refresh its memory by consulting standard and well-known historical and scientific works. See *ante*, § 145.

⁵ *Campbell v. West*, 86 Cal. 197; *Casey v. Reeves*, 46 Kan. 571;

Adams v. Harrington, 114 Ind. 66; *Forehand v. State*, 53 Ark. 46; 3 S. W. Rep. 728; *Borough v. Brown*, 11 Pa. Co. Ct. R. 272; *People v. Wood*, 131 N. Y. 617; *Linck v. Litchfield*, 31 N. E. Rep. 123; *Winn. Lake Co. v. Young*, 40 N. H. 420; *Goodwin v. Appleton*, 22 Me. 453; *State v. Dunnell*, 3 R. I. 127; *Com. v. Desmond*, 103 Mass. 445; *Overton v. State*, 60 Ala. 73; *State v. Reader*, 60 Iowa, 527; *Dexter v. Cranston*, 41 Mich. 448; *Schilling v. Territory*, 2 Wash. Ter. 283; *Lewis v. State* (Tex., 1893), 24 S. W. Rep. 903; *People v. Suppiger*, 103 Ill. 434; *Terre Haute, etc. Co. v. Pierce*, 95 Ind. 496; *Sullivan v. People*, 122 Ill. 385. *Contra*, *Grusenmeyer v. Logansport*, 76 Ind. 549. The area of counties need not be proved (*Buckinghouse v. Gregg*, 19 Ind. 401; *Wright v. Hawkins*, 28 Tex. 452), though the date of their organization must be shown. *Ellsworth v. Nelson*, 81 Iowa, 57; *Rousey v. Wood*, 47 Mo. App. 465; *State v. Cleveland*, 80 Mo. 108.

⁶ *United States v. Johnson*, 2 Sawy. (U. S.) 482; *United States v. Beebe*, 2 Dak. 292.

it has been held that the courts of a state cannot know judicially of the existence of counties, towns or cities located out of that state, and their existence and location will have to be proved.¹

Judicial notice will be taken of the general natural geographical features of the United States;² of the condition and capacity of its rivers and waters, whether navigable or not;³ of the boundaries of the states;⁴ that a portion of one state had been separated from⁵ or ceded to another,⁶ or to the federal government;⁷ of the location and character of mountain ranges,⁸ the distances between places,⁹ and their population as shown by the census.¹⁰

Though the courts are not bound to take notice of the time it requires for the mails between places,¹¹ they may do so.¹²

¹ Richardson v. Williams, 2 Port. (Ala.) 239; Woodward v. Railroad Co., 21 Wis. 309; Riggin v. Collier, 6 Mo. 568; Ellis v. Park, 8 Tex. 205; Whitlock v. Castro, 22 id. 108.

² Mossman v. Forrest, 27 Ind. 233; Stroudsburg v. Brown, 11 Pa. Co. Ct. R. 272.

³ Brown v. Scofield, 8 Barb. 279; People v. Mining Co., 66 Cal. 138; Cum. v. King, 150 Mass. 221; Cash v. Auditor, 7 Ind. 227; Walker v. Allen, 72 Ala. 456; Ross v. Faust, 54 Ind. 471; Tewksbury v. Schulenberg, 41 Wis. 584; Neaderheuser v. State, 28 Ind. 257; Thurman v. Morrison, 14 B. Mon. 296.

⁴ The Appollon, 9 Wheat. 374; Peyroud v. Howard, 7 Pet. 342; Thorson v. Peterson, 9 Fed. Rep. 517; Ogden v. Lund, 11 Tex. 688; Harrold v. Arrington, 64 Tex. 233.

⁵ Bank v. Machir, 18 W. Va. 271.

⁶ People v. Snyder, 41 N. Y. 397.

⁷ Hewthorn v. Doe, 1 Blackf. (Ind.) 159.

⁸ Casey v. Reeves, 26 Pac. Rep. 951; 46 Kan. 571; Price v. Page, 24 Mo. 65.

⁹ Pearce v. Langfit, 101 Pa. St. 511; Mut. Ben. L. I. Co. v. Robison, 58

Fed. Rep. 723; McConnell v. Boudry, 4 T. B. Mon. 394; Rice v. Montgomery, 4 Biss. 75; Hegard v. Insurance Co. (Colo., 1890), 11 Pac. Rep. 594.

¹⁰ Denair v. Brooklyn, 5 N. Y. S. 585; Forehand v. State, 13 S. W. Rep. 728; 56 Ark. 46; People v. Williams, 64 Cal. 87; State v. Brascamp, 54 N. W. Rep. 532; Welch v. County, 29 W. Va. 63; State v. County, 89 Mo. 237; Hawkins v. Thomas, 3 Ind. App. 399; 29 N. E. Rep. 157; Kalbrier v. Leonard, 34 Ind. 497. A court will notice the fact that many persons of foreign birth reside in a certain locality. Kernitz v. L. I. City, 50 Hun, 428; 3 N. Y. S. 144. Courts are not bound to take notice of the loss incurred by a railroad company because an Indian reservation had been located within the boundaries of its land. Elling v. Thexton, 16 Pac. Rep. 931.

¹¹ Wiggins v. Burkham, 10 Wall. 129; Rice v. Montgomery, 4 Biss. 75.

¹² Pearce v. Langfit, 101 Pa. St. 507. It may be remarked that placing a letter in a street letter-box or handing it to a carrier or collector is

§ 240. **Political facts — Elections.**—The existence and political and executive acts of the supreme authority to which the court is subordinate will be judicially noticed, particularly if its existence has been the result of statutory enactment or where its acts have assumed the form of laws regularly promulgated. Thus, the proclamations of the president of the United States,¹ the messages² and commissions of the governor of the state,³ the regulations settled by the heads of executive departments for carrying on business,⁴ together with the authenticity of the signatures and seals attached to such documents, need not be shown by evidence.⁵ The courts will also take judicial notice of the date of the appointment or accession to office of an executive official,⁶ of his public acts,⁷ and of the date upon which his term expires by death or limitation.⁸ So it has been held that the courts will notice the days of holding general elections;⁹ that an election has been held,¹⁰ the whole number of votes cast, and the result of the voting,¹¹ together with the fact that the result is contested by the defeated candidate.¹²

Judicial notice will be taken, in all collateral proceedings not involving the title to the office, that certain persons are

mailing. Abb. Brief on Facts, § 517; Pearce v. Langfit, *supra*.

¹ The Greathouse Case, 2 Abb. (U. S.) 382; Cuyler v. Ferrill, 1 Abb. (U. S.) 169.

² Dowdell v. State, 58 Ind. 333; Wells v. Railroad Co., 110 Mo. 286; 19 S. W. Rep. 530; Jenkins v. Col-lard, 145 U. S. 546.

³ State v. Carroll, 38 Conn. 449.

⁴ Burke v. Miltenbergër, 19 Wall. 519; Garling v. Van Allen, 55 N. Y. 31; Low v. Hanson, 72 Me. 104; United States v. Williams, 6 Mont. 379. *Contra*, Moore v. Worth, 2 Duv. (Ky.) 308.

⁵ Com. v. Dunlop (Va., 1893), 16 S. E. Rep. 273; Jones v. Gale's Adm'r, 4 Martin, 635; State v. Boyd, 34 Neb. 435; 57 N. W. Rep. 964; State v. Barrett, 40 Minn. 65; Davis v. McEnany, 150 Mass. 451.

⁶ Heizer v. State, 12 Ind. 350; State v. Boyd, 34 Neb. 435; 51 N. W. Rep. 964.

⁷ Jones v. United States, 137 U. S. 202; Prince v. Skillen, 71 Me. 361; State v. Gramelspacher, 126 Ind. 398; Campbell v. West, 86 Cal. 197.

⁸ Cincinnati, etc. Co. v. Jones, 21 S. W. Rep. 192; Doe v. Riley, 28 Ala. 164; Martin v. Aultman, 80 Wis. 150; Ragland v. Wynn, 37 Ala. 32.

⁹ State v. Minnick, 15 Iowa, 123; Himmelman v. Hoadley, 44 Cal. 213; Ellis v. Reddin, 12 Kan. 306.

¹⁰ Urnston v. State, 73 Ind. 175. *Contra*, Ex parte Reynolds, 87 Ala. 138.

¹¹ Thomas v. Com., 17 S. E. Rep. 788; State v. Swift, 69 Ind. 505; Savage's Case, 84 Va. 582.

¹² Lewis v. Bruton, 74 Ala. 317.

actually the incumbents of the various subordinate offices, state and federal, which they purport to hold, and for these reasons their official character need not be affirmatively shown.¹ So courts will notice the place and time established by law for the meeting² and adjournment of congress and the legislature,³ the contents of their journals,⁴ the usual mode of proceeding and the constitutional and statutory privileges of their members.

§ 241. **Scientific facts.**— Courts will take notice of scientific facts of an axiomatic character, but not of those upon which there is a disagreement of opinion among men of eminence in that line of research.⁵ Thus, it is not necessary to show that kerosene⁶ or natural gas is explosive;⁷ that unoccupied buildings are exposed to damage from fire;⁸ that whisky, gin,⁹ rum,¹⁰ wine¹¹ and beer are intoxicating liquors;¹² that beer is a malt liquor;¹³ that the sun¹⁴ or moon¹⁵ sets or rises at a cer-

¹ Kellar v. Moore, 51 Ala. 340 (commissioner of deeds); Thompson v. Haskell, 21 Ill. 215 (sheriff); Timberlake v. Brewer, 59 Ala. 108; Coleman v. State, 63 id. 93 (justice of the peace); Ede v. Johnson, 15 Cal. 53; Russell v. Sargent, 7 Ill. App. 98. Cf. Davis v. McEnaney, 150 Mass. 451.

² Perkins v. Woodfolk, 8 Baxt. 411.

³ Perkins v. Woodfolk, 8 Baxt. 411.

⁴ McDonald v. State, 80 Wis. 407; id. 414; Barnard v. Gall, 43 La. Ann. 959; People v. Stewart, 97 Ill. 123.

⁵ St. Louis, etc. Co. v. Am. T. I. Co., 33 Mo. App. 348; Com. v. Marzynski, 149 Mass. 68; Luke v. Calhoun, 52 Ala. 115; Lyon v. Marine, 55 Fed. Rep. 964; Cozzens v. Higgins, 1 Abb. Ct. App. Dec. 451; Eureka, etc. Co. v. Gazette, 35 Fed. Rep. 570; Trese v. State, 2 S. Rep. 390; State v. Barber, 36 U. S. 313.

⁶ Wood v. Insurance Co., 46 N. Y. 421.

⁷ Jamieson v. Ind. etc. Co., 46 N. Y. 421. *Contra*, as to the inflammable nature of gin and turpentine, Mosley v. Insurance Co., 55 Vt. 142.

⁸ White v. Insurance Co., 83 Me. 279.

⁹ Com. v. Peckham, 2 Gray, 514.

¹⁰ United States v. Angell, 11 Fed. Rep. 54.

¹¹ Kizer v. Randleman, 5 Jones' L. 428; State v. Packer, 80 N. C. 439.

¹² State v. Effinger, 44 Mo. App. 81; State v. Teissedre, 30 Kan. 484; Wetzler v. Keely, 83 Ala. 444; Thomas v. Com. (Va., 1893), 17 S. E. Rep. 788; Maier v. State (Tex., 1893), 21 S. W. Rep. 974.

¹³ United States v. Ducournac, 54 Fed. Rep. 138; Aller v. State, 55 Ala. 16; State v. Gayette, 11 R. I. 592; Watson v. State, 55 Ala. 158; Fenton v. State, 100 Ind. 90. Whether a particular sort of beer is an intoxicating drink was left to the jury in Commonwealth v. Bloss, 116 Mass. 56; State v. McCafferty, 63 Me. 233. So

¹⁴ Lake Erie, etc. Co. v. Hatch, 6 Ohio Cir. Ct. 230.

¹⁵ Case v. Perew, 46 Hun, 57.

tain hour; that a railroad is a common carrier,¹ or that its operation on a city street increases traffic;² that a mule is a domestic animal;³ that a fracture of the skull may produce death;⁴ the length of the period of gestation;⁵ that no man was ever known to be nine feet high,⁶ and that tobacco is neither a drug nor medicine.⁷

Courts will not take notice of facts to be found only in encyclopedias and similar works or of facts which do not form a part of the general stock of scientific information.⁸ Thus, the courts will not take notice that each concentric circle in a cross-section of timber marks a year's growth;⁹ that kerosene is refined coal oil;¹⁰ that oleomargarine is or is not unwholesome,¹¹ or that a certain crime is physically impossible of commission.¹²

§ 242. Common and statutory law — Municipal ordinances and local and foreign laws.—The rules, maxims and principles of the common law which prevail in any jurisdiction need not be shown in court.¹³ So the rules of the law

of cider or ale after it has fermented. *State v. Biddle*, 54 N. H. 379. And whether blackberry wine is a spirituous liquor is for the jury to decide. *State v. Lowry*, 74 N. C. 121.

¹ *Caldwell v. Richmond, etc. Co.*, 89 Ga. 550.

² *Bookman v. N. Y. El. R. R. Co.*, 137 N. Y. 303.

³ *State v. Gould*, 26 W. Va. 258.

⁴ *McDaniel v. State*, 76 Ala. 1.

⁵ *King v. Luff*, 8 East, 193.

⁶ *Hunter v. Railway Co.*, 116 N. Y. 615.

⁷ *Com. v. Marzynski*, 149 Mass. 68. In this case the court said: "Ordinarily, whether a substance or article comes within a given description is a question of fact; but some facts are so obvious and familiar that the law takes notice of them and receives them into its domain. If the proof had been that the shop had been kept open for the purpose of selling guns or pistols, it would hardly be contended that the judge might not

properly have ruled that the sale of these articles was not a sale of drugs or medicine. The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicine, and may exclude the opinions of witnesses who offer to testify that they are."

⁸ *Engraving Co. v. Hoke*, 30 Fed. Rep. 444; *Culverhouse v. Wertz*, 32 Mo. App. 24; *Fowler v. Park*, 48 Fed. Rep. 789; *Meely Hee v. Hudson*, 21 S. W. Rep. 175.

⁹ *Patterson v. McCausland*, 3 Bland, 69.

¹⁰ *Bennett v. Insurance Co.*, 8 Daly, 471.

¹¹ *North. Mfg. Co. v. Chambers*, 58 Mich. 381.

¹² *Ausman v. Veal*, 10 Ind. 355.

¹³ *St. Louis Ry. Co. v. Weaver*, 35 Kan. 412; *Wilson v. Bumstead*, 12 Neb. 1. "The authority of the maxims of the common laws rests upon their general acceptance, and this

of nations regulating the intercourse of civilized nations need not be shown,¹ as the courts of all civilized countries will take notice of the principles of that law.² So it is well settled that notice will be taken of the law merchant³ and of the customs of persons engaged in particular avocations, such as merchants;⁴ railway companies,⁵ and other common carriers;⁶ of bankers,⁷ mercantile agencies,⁸ physicians,⁹ conveyancers¹⁰ and public officials.¹¹ So a court will take judicial notice of the official character, signature and seal of a foreign or domestic notary public attached to a protest for non-payment or other instrument.¹² Foreign customs forming no part of the law merchant must be proved as matter of fact.¹³

In America the federal courts will take notice judicially not only of the constitution and public statutes of the United States,¹⁴ but of all state constitutions and statutes applicable to cases pending in them,¹⁵ as well as of the decisions of the state

connotes their general notoriety. Thus, as the courts cannot refuse to know what is presumed to be within the knowledge of all men — for every one is presumed to know the law — it is said that the doctrines, axioms and principles of the common law are deposited in the breast of the judges, to be applied to the facts which are properly ascertained or proved before them." 3 Bl. Com. 379.

¹ 1 Bl. Com. 75, 76, 85; *Edie v. E. I. Co.*, 2 Burr. 1226; *The Scotia*, 14 Wall. 170.

² *Croudson v. Leonard*, 4 Cranch, 434; *Ocean Insurance Co. v. Francis*, 2 Wend. 64.

³ *Munn v. Burch*, 25 Ill. 35; *Wiggin v. Chicago*, 5 Mo. App. 347.

⁴ *Almy v. Simonson*, 52 Hun, 535; *Bank v. Fitzhugh*, 1 Har. & G. (Md.) 239; *Gibson v. Stevens*, 9 How. (U. S.) 384; *Watt v. Hoch*, 25 Pa. St. 411; *Consequa v. Willings*, 1 Pet. 225; *Jewell v. Center*, 25 Ala. 498; *Reed v. Wilson*, 41 N. J. L. 29.

⁵ *Lane v. L. E. R. Co.*, 23 N. Y.

Weekly Dig. 267; *Isaacson v. N. Y. Cent. R. R. Co.*, 94 N. Y. 278.

⁶ *State v. Liquor*, 73 Me. 278.

⁷ *Fleming v. McClure*, 1 Brev. 428; *Brandas v. Barnett*, 3 M. G. & S. 519; *Bank v. Hall*, 83 N. Y. 338; *Yerkes v. Bank*, 69 id. 383.

⁸ *Eaton v. Avery*, 83 N. Y. 31.

⁹ *Yeaton v. Fry*, 5 Cranch, 335; *Chamoise v. Fowler*, 3 Wend. 173.

¹⁰ *Doe v. Hilder*, 2 B. & Ald. 793.

¹¹ *Bigelow v. Chatterton*, 57 Fed. Rep. 614.

¹² *Pierce v. Indseth*, 106 U. S. 546; *Denmead v. Maack*, 2 MacArthur, 475; *United States v. Libby*, 1 W. & M. 221, *Stoddard v. Sloan*, 65 Iowa, 680.

¹³ *Dutch, etc. Co. v. Mooney*, 12 Cal. 585; *Munn v. Burch*, 25 Ill. 21; *Turner v. Fish*, 28 Miss. 306; *Lewis v. McClure*, 8 Ore. 273.

¹⁴ *Kessel v. Albetis*, 56 Barb. 363; *Murphy v. Hendricks*, 57 Ind. 593; *Morris v. Davidson*, 49 Ga. 361; *Laidley v. Cummings*, 83 Ky. 607; *Mims v. Schwarz*, 37 Tex. 13.

¹⁵ *Hinde v. Vattier*, 5 Pet. 398;

courts construing them.¹ On the other hand, the federal constitutions and statutes need never be proved in the state courts, as they are bound to take judicial notice of their enactment and contents,² as well as of the constitutions and public statutes of their own state.³

In conformity with the rule that courts will take judicial notice of public statutes, municipal charters and acts incorporating public or *quasi*-public corporations need not be shown.⁴

Jones v. Hays, 4 McLean, 521; Course v. Head, 4 Dall. 22; Elmen-dorf v. Taylor, 10 Wheat. 152; Cov-ington B. Co. v. Shepherd, 20 How. (U. S.) 227; Knower v. Haines, 31 Fed. Rep. 513; Fourth Nat. Bank v. Francklyn, 120 U. S. 751; Jasper v. Porter, 2 McLean, 579; Carpenter v. Dexter, 8 Wall. 515; New Jersey v. Yard, 95 U. S. 112; Gormley v. Bunyan, 138 U. S. 623; Gordon v. Hobart, 2 Sumn. 401; Newberry v. Robinson, 36 Fed. Rep. 841; Hanley v. Donoghue, 116 U. S. 4. The federal courts will notice state laws only so far as the state courts notice them and as far they are called upon to administer them. If the state court is required to notice local or private laws, a federal court in that state must also do so. Abb. Brief on Facts, § 383, citing Beaty v. Knowler, 4 Pet. (U. S.) 152; Renaud v. Abbott, 116 U. S. 277. "The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union in cases to which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states, and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence, then, is in no sense a foreign jurisprudence to be proved in the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are to be established, but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." The court, by Story, J., in Owings v. Hull, 9 Pet. (U. S.) 624.

¹ Cheever v. Wilson, 9 Wall. 108; Pennington v. Gibson, 16 How. 65; Evans v. Railroad Co., 5 Phila. 512.

² Morris v. Davidson, 49 Ga. 351; Caughran v. Gilman, 81 Iowa, 442; 46 N. W. Rep. 1005; Laidley v. Cummings, 83 Ky. 606; Baylis v. Chubb, 16 Gratt. 284; Wetumpka v. Wharf Co., 63 Ala. 611; Dwyer v. Brenham, 65 Tex. 526; Durch v. Chippewa, 60 Wis. 227; Bird v. Com., 21 Gratt. (Va.) 800; State v. Cooper, 101 N. C. 684.

³ Harpending v. Church, 16 Pet. 455; Van Swarton v. Com., 24 Pa. St. 131; Bowen v. Missouri P. etc. Co. (Mo., 1893), 24 S. W. Rep. 436; Lane v. Harris, 16 Ga. 217; Berliner v. Waterloo, 14 Wis. 378; State v. Bailey, 16 Ind. 46; Binkert v. Jensen, 94 Ill. 283.

⁴ Albritten v. Huntsville, 60 Ala. 486; Briggs v. Whipple, 7 Vt. 15; Washington v. Finley, 5 Eng. (Ark.) 423; State v. Murfreesboro, 11

The same rule is also applicable to statutes amending or repealing a city charter¹ or other public statute.²

The rule that public laws will be judicially noticed is not violated by the fact that municipal ordinances and resolutions must, independently of statute, be pleaded and proved, as these municipal enactments, like the by-laws of private corporations,³ are not public statutes within the meaning of the rule.⁴ But municipal courts will take judicial notice of ordinances.⁵ Courts will not take notice of private statutes affecting an individual or small number of persons unless authorized by statute to do so;⁶ for example, of a special act creating a private

Humph. (Tenn.) 217; *Payne v. Treadwell*, 16 Cal. 220; *Stier v. Oscaloosa*, 41 Iowa, 353; *Selma v. Perkins*, 68 Ala. 145; *Potwin v. Johnson*, 108 Ill. 70; *Solomon v. Hughes*, 24 Kan. 211; *State v. Sherman*, 42 Mo. 210; *Durch v. Chippewa*, 60 Wis. 227; *Dwyer v. Brenham*, 65 Tex. 529; *Pasadena v. Stimson*, 27 Pac. Rep. 604; *State v. Tosney*, 26 Minn. 262; *Smith v. Janesville*, 52 Wis. 680; *Burpenning v. Railroad Co.*, 48 N. W. Rep. 444; *Many v. Titcomb*, 19 Ind. 136.

¹*New Jersey v. Yard*, 95 U. S. 112; *State v. Bergen*, 34 N. J. L. 439; *Swain v. Comstock*, 18 Wis. 463; *Bow v. Allentown*, 34 N. H. 351; *Railroad v. Chenoa*, 43 Ill. 209; *Virginia City v. Manufacturing Co.*, 2 Nev. 86; *Railroad v. Plumas Co.*, 37 Cal. 354. If the city has been incorporated under a general law its incorporation must be shown. *Temple v. State*, 15 Tex. App. 405; *Morgan v. Atlanta*, 77 Ga. 662; *Ingle v. Jones*, 43 Iowa, 286. *Contra*, *House v. Greensburg*, 93 Ind. 533.

²*Belmont v. Warrell*, 69 Me. 314; *Parent v. Walmsley's Adm'r*, 20 Ind. 82.

³The courts do not notice judicially the by-laws of a private corporation

(*Benev. Soc. v. Phillips*, 36 Mich. 22), and the same rule is recognized in the case of the private rules for the government of the members of a board of brokers. *Goldsmith v. Sawyer*, 46 Cal. 209.

⁴*Garvin v. Wells*, 8 Iowa, 286; *Central Bank v. Baltimore*, 20 Atl. Rep. 444; *Garland v. Denver*, 11 Colo. 534; *State v. Mayor*, 11 Humph. 217; *Young v. Bank*, 4 Cranch, 384; *Porter v. Waring*, 69 N. Y. 250; *Clapp v. Hartford*, 35 Conn. 66; *Prell v. McDonald*, 7 Kan. 426; *Lucker v. Com.*, 4 Bush (Ky.), 440; *Ingle v. Jones*, 43 Iowa, 286; *Stier v. Oscaloosa*, 41 Iowa, 353; *Case v. Mobile*, 30 Ala. 538; *Clarke v. Bank*, 10 Ark. 516; *Pettit v. May*, 34 Wis. 666; *People v. Potter*, 35 Cal. 110; *Winona v. Burke*, 23 Minn. 254; *Briggs v. Whipple*, 7 Vt. 15; *Beaty v. Knowler*, 4 Pet. 152.

⁵*Moundville v. Velton*, 18 S. E. Rep. 373; 35 W. Va. 217; *Anderson v. O'Donnell*, 29 S. C. 355.

⁶*Hart v. Balt. etc. Co.*, 6 W. Va. 336; *Somervill v. Winbush*, 7 Gratt. (Va.) 205; *Bixler v. Barker*, 3 Bush (Ky.), 166; *Morgan v. Cree*, 46 Vt. 786; *Collier v. Society*, 8 B. Mon. 68; *Halbert v. Skyler*, 1 A. K. Marsh, 368,

corporation,¹ or one relating exclusively to the settlement of an estate.² Such private acts relating to a few persons are not matters of general public knowledge, and are regarded somewhat as *quasi*-contracts between the state and those persons specially interested, with the terms of which the court is ignorant until it shall have ascertained them from the evidence.³ So courts will not take notice of foreign laws, either statute or common, and they will usually have to be alleged and proved as matters of fact.⁴ The states and territories of the United

¹ Danville, etc. Co. v. State, 16 Ind. 456; Kelly v. Railroad Co., 58 Ala. 489; Holloway v. Railroad Co., 23 Tex. 465; Jackson v. Plumb, 8 Johns. 295; Peoria, etc. Co. v. Scott, 116 Ill. 401. Sometimes proof of corporation charters is dispensed with by statute unless incorporation is the fact in issue. Star Brick Co. v. Redsdale, 36 N. J. L. 229. So when organized under general laws the courts will notice the latter, but not the incorporation under it. Covington Draw. Co. v. Shepherd, 20 How. (U. S.) 227; Danville, etc. Co. v. State, 16 Ind. 456.

² Leland v. Wilkinson, 6 Pet. 317; Ellis v. Eastman, 32 Cal. 447.

³ Collier v. Society, 8 B. Mon. 68; Leland v. Wilkinson, 6 Pet. 317; State v. Pose, 33 La. Ann. 932; Banks v. Gruben, 87 Pa. St. 468; Perdicaris v. Trenton, etc. Bridge Co., 5 Dutch. (N. J.) 367; Broad Street Hotel Co. v. Weaver, 57 Ala. 26; Allegheny v. Nelson, 25 Pa. St. 332. "The courts of justice are bound, *ex officio*, to take notice of public acts without their being pleaded, for they are part of the general law of the land, which all persons, and particularly the judges, are presumed to know; but they are not bound to take notice of private acts unless they be specially pleaded and shown in proof by the party claiming the effect of them." 1 Kent's Com. 430.

⁴ Millard v. Truax (Mich., 1888), 41 N. W. Rep. 328; Pickering v. Fisk, 6 Vt. 102; Liverpool, etc. G. W. Co. v. Phenix Ins. Co., 129 U. S. 464 (English statute); Spellier, etc. Co. v. Geiger, 23 Atl. Rep. 547; 147 Pa. St. 399; Cont. Bank v. Wells, 73 Wis. 352; Leatherwood v. Sullivan, 81 Ala. 458; Dainese v. Hall, 91 U. S. 13; Bouldin v. Phelps, 30 Fed. Rep. 547; Polk v. Butterfield, 9 Colo. 325; Taylor v. Boardman, 25 Vt. 581; Ludlow v. Van Rensselaer, 1 Johns. 95 (foreign revenue laws); Insurance Co. v. Forchheimer, 86 Ala. 541; St. Louis v. San Francisco R. R. Co., 35 Kan. 426; Mobile, etc. R. R. Co. v. Whitney, 39 Ala. 468; Walsh v. Dart, 12 Wis. 635; Cavender v. Guild, 4 Cal. 250; Anderson v. Anderson, 23 Tex. 639; Talbot v. Seaman, 1 Cranch (U. S.), 38; Ennis v. Smith, 14 How. (U. S.) 400; Chumasero v. Gilbert, 24 Ill. 293; Haines v. Hanrahan, 105 Mass. 480; Cutler v. Wright, 22 N. Y. 472. In Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 444, the court said: "The law of Great Britain, since the Declaration of Independence, is the law of a foreign country, and like any other foreign law is a matter of fact which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country can-

States are so far foreign to one another that this rule is generally applicable to their courts.¹

As constituting an exception to the rule which has been just stated, it has been held that in those parts of the United States which formerly constituted parts of the colonial possessions of France, Spain or Russia, the laws in force at the time such territory became a part of the United States need not be proved as foreign laws, but will be judicially noticed.²

Another exception to the rule that a state court will not judicially notice the laws of a sister commonwealth is occasioned by the application of the principle that a federal court will always take notice of the state statutes which it is actually called upon to administer. Where any question is litigated in a state court involving the construction or enforcement of the federal constitution or statutes, and is or might be subsequently appealed to a federal court, the statutory law of that state, so far as it would be judicially noticed by the appellate federal court, will, it has been held, be judicially noticed by the courts of other states also.³

Treaties made by the federal government with the Indian tribes or with a foreign government are a component part of the supreme statutory law⁴ and possess the full power and efficacy of an act of congress.⁵ The courts, both federal and

not take cognizance of the law of another without plea and proof has been constantly maintained at law and in equity."

¹Thatcher v. Morris, 11 N. Y. 437; Wilson v. Cockrell, 8 Mo. 7; St. Louis, etc. Co. v. Weaver, 35 Kan. 412; 21 Pac. Rep. 408; Owen v. Boyle, 15 Me. 147; Billingsley v. Dean, 11 Ind. 331; Hanley v. Donoghue, 116 U. S. 1; Sloan v. Torrey, 78 Mo. 623; Eastman v. Crosby, 90 Mass. 206; Bradshaw v. Mansfield, 18 Tex. App. 21. The law will be presumed to be known to foreigners who contract abroad where the contract is to be carried out in this country. De Witt v. Brisbane, 16 N. Y. 508. *Contra* where such a contract is to be performed abroad. Merch. Bank v. Spalding, 9 N. Y. 53.

²Crandall v. Sterling, 1 Colo. 106; Pecquet v. Pecquet, 17 La. Ann. 204; Chouteau v. Soulard, 9 Mo. 581; United States v. Perot, 8 Otto, 428; Adams v. Norris, 23 How. (U. S.) 353; Payne v. Treadwell, 16 Cal. 231; Henthorn v. Doe, 1 Blatch. 157. The same exception obtains where new states are formed by the subdivision of one already existing. Delano v. Joysling, 1 Litt. (Ky.) 117; Holley v. Holley, 12 Am. Dec. 342.

³Butcher v. Brownsville, 2 Kan. 70; Morse v. Hewett, 28 Mich. 481; State v. Hinchman, 27 Pa. St. 479; Paine v. Schenectady, 11 R. I. 411; Fellows v. Menasha, 11 Wis. 558.

⁴U. S. Const., art. VI, cl. 2.

⁵Holmes v. Jennison, 14 Pet. 569; Doe v. Braden, 16 How. 635; Hunen-

state, are bound to take judicial notice of their existence, dates, character and contents, and of the rights of all persons under them.¹

Finally, it may be noted that the legal rate or amount of interest prevalent in the jurisdiction need not be shown, as the court will compute it,² though a contrary rule obtains as regards the legal rate abroad,³ or even in a neighboring country.⁴

§ 243. Foreign nations, seals and official acts.—The existence of foreign governments need not be proved, for a court will take judicial notice of this fact and will recognize the respective title, flag and seal⁵ of any state whose existence *de facto* or *de jure* has been admitted by the sovereignty within whose jurisdiction the court is located.⁶ Where a foreign government has not been acknowledged its existence must be proved,⁷ while, if it has been acknowledged, the fact of its acknowledgment, being a public executive act, will be judicially noticed.⁸

§ 244. Terms of courts, records, rules of practice and judicial proceedings.—A court will ordinarily take judicial notice of its own records,⁹ of the beginning¹⁰ and length of its

stein v. Lynham, 10 Otto, 483. See, also, 1 Kent's Com. 31, 32.

¹ Godfrey v. Godfrey, 17 Ind. 6; Carson v. Smith, 5 Minn. 78; United States v. Payne, 2 McCrary C. C. 289; Dole v. Wilson, 16 Minn. 472; Montgomery v. Deeley, 3 Wis. 623; United States v. Reynes, 9 How. (U. S.) 127; Jones v. Laney, 3 Tex. 342. Cf. American Ins. Co. v. Canter, 1 Pet. 511; Foster v. Neilson, 2 Pet. 314; United States v. Arredondo, 6 id. 691.

² School Dist. No. 1 v. Lyford, 27 Wis. 506.

³ Coghlan v. Railroad, 142 U. S. 101.

⁴ Kermott v. Ayer, 11 Mich. 181. The rates will not be presumed to be the same.

⁵ Lincoln v. Battelle, 6 Wend. 476.

⁶ Schoerkin v. Swift, 19 Blatch. (U. S.) 209; Church v. Hubbard, 2 Cranch, 187, 238; United States v.

Johns, 4 Dall. 416; Santissima v. Trinidad, 7 Wheat. 273, 335; Lazier v. Westcott, 26 N. Y. 146.

⁷ 1 Kent's Com. 189; United States v. Palmer, 3 Wheat. 610; Yrissari v. Clement, 2 C. & P. 223.

⁸ Taylor v. Barclay, 2 Sim. 213.

⁹ Dewey v. St. Albans Co., 12 Atl. Rep. 224; Dines v. People, 39 Ill. App. 565; Minor v. Stone, 1 La. Ann. 283; Farrar v. Bolles, 55 Tex. 193; Brucker v. State, 19 Wis. 539; Anix v. Miller, 54 Iowa, 541; Robinson v. Brown, 82 Ill. 279; Jordan v. Circuit Court, 69 Iowa, 177; State v. Postlewait, 14 Iowa, 446. *Contra*, Lake Merced W. Co. v. Cowles, 31 Cal. 215; Baker v. Muggatt, 141 U. S. 141; State v. Edwards, 19 Mo. 674; Stanley v. McElrath, 86 Cal. 449, where the records of one case are to be used in another.

¹⁰ Kidder v. Blaisdell, 45 Me. 461.

terms;¹ of its officials,² as sheriff or marshal;³ of the signature of its clerk⁴ or its attorneys of record,⁵ its rules of practice and procedure; nor is it necessary to prove similar facts appertaining to other courts located in the same jurisdiction.⁶ A court of superior or appellate jurisdiction will also take notice of the officers, judges,⁷ seals,⁸ terms,⁹ organization, jurisdiction¹⁰ and powers of inferior courts.¹¹ Where insulting language is used towards a judge holding court, he may in committing the offender for contempt act solely and exclusively upon his own knowledge of the words used,¹² although under such circumstances it is not competent for him to take judicial notice of the fact that the offender had been theretofore tried and found guilty of a previous contempt of the same court.¹³

¹ Fabyan v. Russell, 38 N. H. 84.

² Norvell v. McHenry, 1 Mich. 227; Land Co. v. Calhoun, 16 W. Va. 362; Dyer v. Last, 51 Ill. 179.

³ Slaughter v. Barnes, 3 A. K. Marsh. 412; Alexander v. Burnham, 18 Wis. 199; Ingram v. State, 27 Ala. 17; Thompson v. Haskell, 21 Ill. 215. But the official character of deputy-sheriffs and deputy-marshals must be shown. Potter v. Luther, 3 Johns. 431; Land v. Patterson, Minor (Ala.), 14; Ward v. Henry, 19 Wis. 76; Bank v. Curran, 10 Ark. 142; Alford v. State, 8 Tex. App. 545.

⁴ Yell v. Lane, 41 Ark. 53; Buell v. State, 72 Ind. 523; Alderman v. Bell, 9 Cal. 315; Land Co. v. Calhoun, 16 W. Va. 362.

⁵ Masterson v. Leclaire, 4 Minn. 108.

⁶ Rees v. Lowenstein (Minn., 1888), 40 N. W. Rep. 370; Kenosha v. Shedd, 82 Iowa, 140; 48 N. W. Rep. 933; Ohm v. San Francisco (Cal., 1890), 25 Pac. Rep. 155; Stanley v. McElrath, 86 Cal. 449; Olmstead v. Thompson, 8 S. Rep. 755; Benson v. Christian, 129 Ind. 535; State v. Ulrich, 110 Mo. 350; 19 S. W. Rep. 656; Alexander v. Gish (Ky., 1891),

17 S. W. Rep. 287. Cf. Holly v. Bass, 68 Ala. 206.

⁷ Graham v. Anderson, 42 Ill. 514.

⁸ State v. Snowden, 1 Brews. (Pa.) 218; Mangum v. Webster, 7 Gill, 78. ⁹ Stubbs v. State, 53 Miss. 437; Pugh v. State, 2 Head, 237; Williams v. Hubbard, 1 Mich. 446; McGinnis v. State, 24 Ind. 500; Bethune v. Hale, 45 Ala. 522; State v. Hammet, 12 Ind. 448; Davidson v. Peticolis, 34 Tex. 37; Simms v. Todd, 72 Mo. 288.

¹⁰ Masterson v. Mathews, 60 Ala. 260; Stiles v. Stewart, 12 Wend. 473; Tucker v. State, 11 Md. 322; Kilpatrick v. Com., 31 Pa. St. 198.

¹¹ Hancock v. Worcester, 18 Atl. Rep. 1041; Nelson v. Ladd, 54 N. W. Rep. 309 (S. D., 1893); Vahle v. Brackenseick (Ill., 1893), 34 N. E. Rep. 524; Hatcher v. Rocheleau, 18 N. Y. 86; Landlin v. Anderson, 76 Ala. 403; Cherry v. Baker, 17 Md. 75; Kilpatrick v. Com., 31 Pa. St. 198; Dorman v. State, 56 Ind. 454; Lewis v. Wintrebe, 76 Ind. 13; Cutter v. Caruthers, 48 Cal. 178.

¹² State v. Gitson, 10 S. E. Rep. 58; 33 W. Va. 97.

¹³ Myers v. State (Ohio, 1888), 22 N. E. Rep. 43; Ralphs v. Hensler, 32

As respects all matters of which judicial notice is taken, the judge may, where his knowledge is lacking or his memory indistinct, consult any person or such works of reference as he may select.¹

Pac. Rep. 243; *Jordan v. Circuit ed.*), § 21; *Reed v. Wilson*, 41 N. J. Court, 69 Iowa, 177. L. 29, holding that a court may re-

¹ *Wagner's Case*, 61 Me. 178; *fer to an almanac. See, also, Case United States v. Teschmaker*, 22 v. *Perew*, 46 Hun (N. Y.), 57. How. (U. S.) 392; *Taylor Ev.* (7th

CHAPTER XIX.

BURDEN OF PROOF AND RIGHT TO OPEN AND CLOSE.

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| <p>§ 247. Burden of proof defined.</p> <p>248. Burden of proof in special proceedings.</p> <p>249. Burden of proof in criminal trials.</p> <p>250. Proof of negative—Facts best known to party alleging.</p> | <p>§ 251. When plaintiff may open and close.</p> <p>252. When defendant may open and close.</p> <p>253. Right to open and close in special proceedings.</p> <p>254. Right, when discretionary.</p> |
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§ 247. **Burden of proof defined.**—The phrase “burden of proof” may be defined as that “obligation which the law imposes on a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action, to establish it *prima facie* by proof.”¹ The law casts the burden of proof, as a general rule, upon the party maintaining the affirmative side of the issue. In other words, the party who alleges his possession of a legal right is under the necessity of substantiating his allegation by a preponderance of proof.² This rule is intended to expedite the administration of justice and to aid in the ascertainment of the truth by requiring the evidence to come, in the first instance, from the party whose allegations are most susceptible of direct and simple proof.³ The two phrases “burden of proof” and the “weight of evidence” are quite diverse in meaning. The burden of proof is fixed at the inception of the trial and does not change at any

¹ Anderson's Law Dict., citing *People v. McCann*, 16 N. Y. 66; *Willett v. Rich*, 142 Mass. 357.

² “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist must prove that those facts do or do not exist.” Stephen's Dig. Ev., art. 93.

³ *Lauer v. Kuder* (Ill., 1893), 34 N. E. Rep. 484; *Columbus Watch Co. v. Hodenpyle*, 135 N. Y. 430; *Hyde v. Shank*, 93 Mich. 535; *First Nat. Bank v. Lowrey* (Neb., 1893), 64 N. W. Rep. 568; *Costigan v. Mohawk, etc. Co.*, 3 Denio, 609; *Panama, etc. Co. v. Johnson*, 63 Hun, 629; *Stevenson v. Marony*, 6 Ind. 330; *Jones v. Kennedy*, 11 Pick. 125, 132.

later stage of the proceeding.¹ The weight of evidence, on the contrary, fluctuates from one party to the other, according to the strength and character of the proofs produced by either side in affirmance or in denial of the facts in issue, and the necessity for the production of a preponderance of evidence is thus shifted from side to side.²

The burden of proof, *i. e.*, the duty or obligation of making out a *prima facie* case, and the obligation of convincing the jury by a preponderance of the evidence, or in criminal trials beyond a reasonable doubt, may both be imposed upon the same party and may remain upon him throughout the trial, though such is by no means always the case. Suppose the plaintiff introduces evidence upon all the essential points which he alleges, thus making a *prima facie* case upon which, if it is not met by any evidence on the part of the defendant, the court would be justified in directing a verdict in his favor. So far he has both sustained the burden of proof and has produced a preponderance of evidence. But if his case *as thus made out* is met by some evidence on the part of the defendant sufficient to send the case to the jury, the plaintiff will not be entitled to a verdict on what he has proved, unless the whole evidence, taking in consideration what the defendant has shown, preponderates in the plaintiff's favor, though he has complied with the rule requiring him to sustain the burden of proof, *i. e.*, to show a *prima facie* case.³ Thus, where one sues on a written contract, he sustains the burden of proof satisfactorily by offering the writing in evidence. He need not prove the consideration as a part of his case, as the validity and sufficiency of the writing will be presumed. But where the defendant alleges and seeks to prove a failure or invalidity of consideration, or to show fraud in procuring the contract, the obligation is on the plaintiff to show a good consideration and that he has acted in good faith by a preponderance of all the evidence in the case.⁴

¹ Lake Ont. etc. Co. v. Judson, 123 N. Y. 278.

² See the remarks of the court in Central B. Corp. v. Butler, 2 Gray (Mass.), 132.

³ Scott v. Wood, 81 Cal. 400; Heine-
man v. Heard, 62 N. Y. 448; Long

v. Long, 44 Mo. App. 141; Kitner v. Whitlock, 88 Ill. 513; Eaton v. Alger, 47 N. Y. 451; Blanchard v. Young, 11 Cush. (Mass.) 345; Pease v. Cole, 53 Conn. 71.

⁴ First Nat. Bank v. McConnell, 17 N. Y. S. 422; 63 Hun, 625; Western

The importance of ascertaining on whom the burden of proof is cast results from the rule by which that party is entitled to open and close the case in respect to the introduction of evidence and the argument of counsel. As a test to determine where the burden of proof lies, it has been proposed that it should be imposed upon that the party who, upon the pleadings and the admissions of record, would be defeated if no evidence were offered on either side.¹ So where the defendant admits the whole cause of action as alleged by the plaintiff, inclusive of the damages or sum which is claimed, but pleads new matter by way of confession and avoidance, as payment, fraud, tender or release, or pleads a counter-claim or set-off, the burden of proof is cast on him.²

§ 248. Burden of proof in special proceedings.—It is also necessary to consider the burden of proof in proceedings not at common law and where no actual issue is involved, as a

Nat. Bank v. Wood, 19 N. Y. S. 81; Galvin v. Meridian Nat. Bank, 129 Ind. 439; Burnham v. Davis, 144 Mass. 104; Hogue v. Williamson (Tex., 1893), 22 S. W. Rep. 762. For cases in which the burden of proof to show *bona fides* was on the holder of the note, see Cover v. Myers (Md., 1892); 23 Atl. Rep. 856; Clafy v. Farrow, 18 N. Y. S. 160; Joy v. Diefendorf, 130 N. Y. 6; Kain v. Bare (Ind., 1892), 31 N. E. Rep. 205; Hazard v. Spencer (R. I., 1892), 23 Atl. Rep. 729. "The burden of proof resting on a plaintiff is co-extensive only with the legal proposition on which his case rests. It applies to every fact which is essential to or is necessarily involved in that proposition; not to facts relied upon in defense to establish an independent proposition, however inconsistent with that upon which the plaintiff's case depends. It is for the defendant to furnish the proof of such facts, and when he has done so the burden is upon the plaintiff, not to disprove those particular facts, nor the proposition which they tend to estab-

lish, but to maintain the proposition upon which his own case rests, notwithstanding such contradictory testimony, and upon the whole evidence in the case. The distinction may be narrow, but it is real and often decisive." Wells, J., in Wilder v. Coles, 100 Mass. 490; Willett v. Rich, 142 Mass. 357.

¹Thompson on Trials, § 223; 1 Greenl. on Ev., § 74; 1 Taylor on Ev., § 338; Kent v. White, 27 Ind. 390. So by statute. See Crabtree v. Atchison (Ky., 1893), 20 S. W. Rep. 266. "The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence." Stephen's Dig. Ev., art. 97.

²Fairbanks v. Erwin, 15 Colo. 366; Truesdale v. Hoyle, 39 Ill. App. 532; Auerbach v. Peetsch, 18 N. Y. S. 453; Brown v. Tanrick, 20 N. Y. S. 369; Suiter v. Park Nat. Bank, 35 Neb. 372; Hamilton v. Coal Co., 61 Hun, 624; Woodson Mach. Co. v. Morse, 47 Kan. 429.

proceeding to probate a will. Here the proponent of the will is regarded as taking the affirmative, and is compelled to assume the burden of proof in the first instance by showing the valid execution of the will,¹ and the testamentary capacity of the testator;² while the contestants, if any, have cast upon them the burden of proving that the instrument offered was procured by fraud or undue influence practiced upon the testator.³

§ 249. **Burden of proof in criminal trials.**—The burden of proof and the obligation to convince the jury beyond a reasonable doubt upon the general issue of the prisoner's guilt is in criminal trials upon the state throughout.⁴ Though the defendant produce no evidence, it is still the duty of the court to submit the *prima facie* case against him to the jury, and to convict him they should be convinced beyond a reasonable doubt of his guilt.⁵ If the defendant shall plead an *alibi*, or that the person for whose homicide he is indicted is alive,⁶ the burden of proof to establish either fact is upon him;⁷ and if

¹ Kennedy v. Upshaw, 66 Tex. 442; Bee v. Bowman (Tenn., 1891), 14 S. W. Rep. 481; Seebrook v. Fedawa (Neb., 1891), 46 N. W. Rep. 650; Mathews' Adm'r v. Furness (Ala., 1891), 8 S. Rep. 661; Goss v. Turner, 21 Vt. 437.

² Norton v. Paxton, 110 Mo. 456; 19 S. W. Rep. 807; Knox v. Knox (Ala., 1892), 11 S. Rep. 204; Jones v. Jones, 63 Hun, 630; Harrison v. Bishop, 131 Ind. 161; 30 N. E. Rep. 1069; Prentiss v. Bates, 93 Mich. 234; Graybeal v. Gardner, 34 N. E. Rep. 523; Wilbur v. Wilbur, 129 Ill. 392.

³ Maddox v. Maddox (Mo., 1893), 21 S. W. Rep. 499; Chandler v. Jost (Ala., 1893), 11 S. Rep. 636; Livingston's Appeal (Conn., 1893), 26 Atl. Rep. 470; Lynch v. Doran (Mich., 1893), 54 N. W. Rep. 882; Brown v. Foster, 112 Mo. 297.

⁴ Com. v. McKee, 1 Gray, 62-65; Lilienthal's Tobacco v. United States, 97 U. S. 237, 266; Turner v. Com.,

86 Pa. St. 54, 74; People v. Hill, 49 Hun, 432.

⁵ See *ante*, § 6; State v. Wingo, 66 Mo. 181; State v. Patterson, 45 Vt. 308; Black v. State, 1 Tex. App. 368; People v. Perini, 94 Cal. 573; Day v. State, 21 Tex. App. 213; Horn v. State, 30 Tex. App. 601; 17 S. W. Rep. 1094; Slade v. State, 29 Tex. App. 381; People v. Tarm Poy, 86 Cal. 225; People v. Downs, 123 N. Y. 558; State v. Taylor, 1 Houst. Cr. Cas. (Del.) 436; McDaniel v. State, 76 Ala. 366; People v. West, 49 Cal. 610; Dixon v. State, 13 Fla. 636; Reid v. State, 50 Ga. 536; State v. Knight, 43 Me. 11; Com. v. Webster, 59 Mass. 295; People v. McCarthy, 110 N. Y. 309; State v. Byers, 100 N. C. 312; Com. v. Daum, 58 Pa. St. 9; United States v. Mingo, 2 Curt. C. C. 1; Hogan v. State, 36 Wis. 296.

⁶ Com. v. Webster, 5 Cush. 295; State v. Vincent, 24 Iowa, 570.

⁷ Westbrook v. State (Ga., 1893), 16 S. E. Rep. 100; French v. State, 12

on either of these points the evidence of an *alibi* in connection with all the testimony raises a reasonable doubt of the presence of the accused, the jury must acquit him.¹

Upon the subject of the burden of proof where the defense is insanity two views are held. By one class of cases it is held that, the existence of the prisoner's sanity being an essential fact, the proof of which is necessary to make the act of which he is accused a crime, it must, like all other necessary facts, be proved *prima facie*, by the prosecution, as a part of its case. The presumption of law that every person is of sound mind² must of course be taken into consideration as sufficient to sustain the preliminary burden of proof on this point.³ When this presumption is rebutted or overthrown by facts tending to show a lack of mental capacity, the duty still rests upon the government to satisfy the jury upon the whole evidence and beyond a reasonable doubt of the prisoner's sanity.⁴ Elsewhere the rule is stated broadly that where insanity is relied on as a defense the burden of proof is on the defendant; and though he need never prove his insanity beyond a reasonable doubt, it is sometimes said that he must do so by a preponderance of the evidence.⁵ But the

Ind. 670; Ware v. State, 67 Ga. 649; State v. Ward, 61 Vt. 192; State v. McCracken, 66 Iowa, 569; 24 N. W. Rep. 43; State v. Henrick, 63 Iowa, 414; Johnson v. State, 21 Tex. App. 368; Turner v. Com., 86 Pa. St. 54; State v. Reitz, 83 N. C. 634; State v. Johnson, 91 Mo. 439; People v. Fong, 64 Cal. 253; State v. Jennings, 81 Mo. 185; Garrity v. People, 107 Ill. 162; Com. v. Webster, 5 Cush. 324. *Contra*, McLain v. State, 18 Neb. 154; 21 N. W. Rep. 720. See, also, *ante*, § 6.

¹ Howard v. State, 50 Ind. 192; Murphy v. State (Fla., 1893), 12 S. Rep. 453; State v. Beasley (Iowa, 1892), 50 N. W. Rep. 570; State v. Sanders, 106 Mo. 188; State v. Taylor (Mo., 1893), 23 S. W. Rep. 806; Adams v. State, 28 Fla. 511. In Briceland v. Com., 74 Pa. St. 469, the

court said: "The defense must cover the time when the offense is shown to have been committed so as to preclude the possibility of presence at the *locus in quo*. This impossibility is to be proven like any other fact."

² See *ante*, § 231.

³ Brotherton v. People, 75 N. Y. 159.

⁴ O'Connell v. O'Brien, 87 N. Y. 577; Com. v. Pomeroy, 117 Mass. 143; Hefron v. State, 8 Fla. 73; State v. Millison, 15 La. Ann. 537; State v. Hamilton, 55 Mo. 520; Dass Case, 1 Gratt. (Va.) 557; State v. Jones, 50 N. H. 370; State v. Wilner, 40 Wis. 304; Armstrong v. State, 30 Fla. 170; Chase v. People, 40 Ill. 352; Walker v. People, 88 N. Y. 81; Guetig v. State, 66 Ind. 91; Cunningham v. State, 56 Miss. 269.

⁵ Walker v. People, 88 N. Y. 81;

view which has received fullest support, and one by which perhaps the lack of harmony in the authorities may be avoided, is that while the burden to show insanity is on the defendant, yet if he introduces evidence sufficient to raise a reasonable doubt in the minds of the jury on that point, it is the duty to acquit.¹ This, it seems, is but stating in another form the proposition that it is the duty of the state to satisfy the jury beyond a reasonable doubt of the prisoner's guilt upon all the evidence, and if this is so, the seeming divergence of the cases is reconciled.²

§ 250. Proof of negative—Facts best known to party alleging.—Though the general rule is that the burden of proof is cast on him who maintains the affirmative, because the affirmative of any proposition is most susceptible of direct proof, yet it should not be considered that the negative, *i. e.*, a denial or defense, is incapable of proof. Particularly if the negative is more than a mere denial of an affirmative proposition—in other words, where it involves *quasi*-affirmative and incidental allegations of time, place or manner—the party asserting it may and should assume the burden of proof.

The natural probability of the truth of the affirmative, the fact that prior to the introduction of any evidence in the case the affirmative is supported by some rebuttable presumption of law, or the fact that the means and instruments of proof are peculiarly in the hands of the party alleging a negative, will furnish some further considerations tending to emphasize the propriety under certain circumstances of casting the burden of proof on the negative.³

People v. Travers, 88 Cal. 238; People v. Taylor, 138 N. Y. 398; People v. Bemmerly (Cal., 1893), 33 Pac. Rep. 263; Lynch v. Com., 77 Pa. St. 205; McLeod v. State, 31 Tex. Cr. App. 331.

¹Brotherton v. People, 75 N. Y. 159; Casey v. People, 31 Hun, 528; People v. McCann, 16 N. Y. 58; Wallers v. People, 32 N. Y. 147.

²King v. Stuart, 91 Tenn. 617; State v. Schaefer (Mo., 1893), 22 S. W. Rep. 447; Armstrong v. State, 30 Fla. 170; Faulkner v. Territory (N. M., 1893), 30 Pac. Rep. 905; State v. Har-

rison, 36 W. Va. 729; State v. Davis, 109 N. C. 780; Langdon v. People, 133 Ill. 392; Fisher v. State, 30 Tex. App. 502; State v. Crawford, 33 Am. L. Reg. 21; Moore v. Com. (Ky., 1892), 18 S. W. Rep. 833; Bolling v. State (Ark., 1891), 18 S. W. Rep. 658; State v. West, 1 Houst. Cr. Cas. 371; State v. Spenser, 21 N. J. L. 196; State v. Coleman, 20 S. C. 444.

³Best, Ev. (Am. ed., 1883), §§ 270, 273, 276; Colorado Coal & Iron Co. v. United States, 123 U. S. 317.

In a criminal prosecution the burden of proving the guilt of the accused is upon the prosecution throughout. Hence, if the non-existence of some fact, or the non-performance of some duty, is a constituent and essential element in the crime with which he is charged, the burden of proving this negative allegation of non-existence or non-performance is upon the prosecution.¹

So in a civil proceeding, where the plaintiff's case is based upon a negative allegation, the proof of which is essential, as in an action brought to recover damages for a malicious prosecution when the non-existence of a probable cause for the arrest or prosecution is a material fact of his case, he will be called upon to prove it.² Again, where it is alleged that the contract which is sued on is not the contract which was made,³ or where an alteration in a note is alleged,⁴ or its genuineness is disputed by the alleged maker,⁵ or a deed is alleged to be invalid because of incapacity of the grantor to execute it,⁶ or in an action to recover a penalty for the non-performance of some specific act,⁷ the burden of proof is on the party alleging the negative.⁸ If a fact is peculiarly within the knowledge of one party rather than the other, the burden of proof is cast upon him who has the better means of proof. This rule may and does result very often in casting the burden of proof upon the party alleging a negative fact.⁹ So, for ex-

¹ *Com. v. Samuel*, 2 Pick. (Mass.) 103; *State v. Morphy*, 33 Iowa, 270; *State v. Hirsch*, 45 Mo. 429.

² 1 Greenl., § 78; *Lucas v. Hunt* (Ky., 1891), 15 S. W. Rep. 781; *Nash v. Hall*, 4 Ind. 444; *Lane v. Crombie*, 12 Pick. 177.

³ *Sparks v. Sparks* (Kan., 1893), 32 Pac. Rep. 892; *Meentz v. Reiken*, 42 Ill. App. 17; *Coffin v. Hydraulic Co.*, 136 N. Y. 655.

⁴ *Hartley v. Corboy*, 150 Pa. St. 23; *Conable v. Keeney*, 61 Hun, 624; *Franklin v. Baker*, 48 Ohio St. 296; *Hagan v. Insurance Co.*, 81 Iowa, 321; *Bushnell v. Glessner*, 46 Minn. 531.

⁵ *Western Nat. Bank v. Wood*, 10 N. Y. S. 81; *Tome v. Gerlach*, 18 N. Y.

932; *Pendleton v. Smissaert* (Colo., 1892), 29 Pac. Rep. 521; *Galvin v. Meridian Nat. Bank*, 129 Ind. 439.

⁶ *Trimbo v. Trimbo*, 47 Minn. 389; *Chancellor v. Donell* (Ala., 1892), 10 S. Rep. 910.

⁷ *Little v. Thompson*, 2 Greenl. (Me.) 228; *Com. v. Samuel*, 2 Pick. (Mass.) 103; *Com. v. Maxwell*, 2 Pick. (Mass.) 139; *Woodbury v. Frink*, 14 Ill. 279.

⁸ *Vigus v. O'Bannon*, 118 Ill. 348; *Beardstown v. Virginia, etc.*, 76 Ill. 34; *Kelly v. Owens* (Cal., 1893), 30 Pac. Rep. 596.

⁹ *Van Horn v. Van Horn* (N. J., 1891), 20 Atl. Rep. 826; *Kilbourn v. Latta*, 7 Mackey, 80; *Dickson v. Evans*, 6 T. R. 57; *State v. Arnold*, 13

ample, in a prosecution for dealing in liquors, or carrying on any other trade or avocation without a written license where one is required by statute, the burden of proof is upon the defendant to show that he has *not* violated the statute.¹

The party making a negative allegation will be compelled to assume the burden of proof where non-performance or a negligent performance of duty is alleged, as in actions which are brought to recover damages for injuries caused by negligence,² or where an allegation of fraud is made and denied, as, for example, in an action by creditors to set aside a conveyance made for the purpose of defeating their claims.³

In an action on an insurance policy the burden of proof is on the defendant company to prove that the insured obtained it by fraud,⁴ or by the suppression of material facts which it was his duty to communicate,⁵ or to show any breach of condition that will defeat a recovery on the policy.⁶

Ired. (N. C.) 184; *Wheat v. State*, 6 Mo. 455; *State v. Higgins*, 13 R. I. 330; *State v. Morrison*, 3 Dev. 299; *Mehan v. State*, 7 Wis. 670.

¹ *Com. v. Zelt*, 138 Pa. St. 615; *State v. Kriechbaum* (Iowa, 1891), 47 N. W. Rep. 872; *State v. Wilson*, 39 Mo. App. 114; *Flower v. State*, 39 Ark. 209 (physician's license); *Lowell v. Payne*, 30 La. Ann. 511; *People v. Nyce*, 34 Hun. 298 (ferry license); *Great W. R. R. Co. v. Bacon*, 30 Ill. 347; *People v. Pease*, 27 N. Y. 45; *Com. v. Curran*, 119 Mass. 206. *Contra*, *Com. v. Locke*, 114 Mass. 288. *Cf.* *Potter v. Deyo*, 19 Wend. 361; *Bliss v. Brainard*, 41 N. H. 256; 1 Greenl. on Ev., § 79.

² *O'Kane v. Miller*, 3 Ind. App. 136; *Texas, etc. Co. v. Morin*, 66 Tex. 133; *Dowell v. Guthrie* (Mo., 1893), 22 S. W. Rep. 893. Burden of showing contributory negligence is on defendant. *Denver, etc. Co. v. Ryan* (Colo., 1892), 23 Pac. Rep. 79; *Spurrier v. Front St. Ry. Co.*, 3 Wash. St. 659; *Fulks v. St. Louis, etc. Co.* (Mo., 1892), 19 S. W. Rep. 818; *Merrill v. Eastern R. Co.*, 139 Mass. 252;

Omaha v. Ayres, 32 Neb. 375; *Waterman v. Chicago, etc. Co.*, 52 N. W. Rep. 247; *Railroad Co. v. Owen*, 15 S. E. Rep. 853.

³ *Lauer v. Kuder* (Ill., 1893), 34 N. E. Rep. 484; *Zucker v. Karpeles*, 88 Mich. 413; *Sewell v. Mead* (Iowa, 1892), 52 N. W. Rep. 227; *Marsh v. Cramer* (Colo., 1891), 27 Pac. Rep. 169; *Smith v. Ogilvie* (N. Y., 1891), 27 N. E. Rep. 807; *Gleason v. Wilson*, 48 Kan. 500; 29 Pac. Rep. 693; *Probert v. McDonald*, 51 N. W. Rep. 212; *Martin Brown Co. v. Cooper*, 82 Tex. 242; *Blackshire v. Pettit*, 35 W. Va. 547. *Contra*, *Norton v. Bank*, 50 Ark. 59; *Bartlett v. Cleavenger*, 35 W. Va. 719.

⁴ *Perine v. Grand Lodge A. O. U. W.* (Minn., 1893), 53 N. W. Rep. 367.

⁵ *Modern Woodman v. Sutton*, 33 Ill. App. 327; *Heilman v. Lazarus*, 90 N. Y. 672; *Tidmarsh v. Wash. F. & M. Ins. Co.*, 4 Mason, 439; *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236; *Elmer v. Mut. Ben. L. Ass'n*, 19 N. Y. S. 289.

⁶ *Sutherland v. Stand. L. Ins. Co.* (Iowa, 1893), 54 N. W. Rep. 453.

Though the burden of proving fraud or undue influence is cast usually upon the party alleging its existence, yet, where from the circumstances or the relations of the parties fraud is presumed, as it is in the case of a sale or a gift to a trustee by the beneficiary, the burden is shifted and the grantee or donee will be compelled to prove that the transaction was *bona fide* and for a good consideration.¹

Where a note is alleged to be usurious and void,² or without consideration,³ or illegitimacy⁴ or insanity is alleged,⁵ or breach of warranty in an action on contract,⁶ or the bad reputation of the plaintiff in an action for libel,⁷ these allegations, though negative in character, cast the burden of proof upon the party making them.⁸

¹ Whitridge v. Whitridge (Md., 1892), 24 Atl. Rep. 645; Carter v. West (Ky., 1892), 19 S. W. Rep. 592; White v. Johnson (Wash., 1892), 29 Pac. Rep. 932; Jackson v. Tatebo, 3 Wash. St. 456; Corrigan v. Peroni, 48 N. J. Eq. 607; King v. Jacobson, 58 Hun, 610; Newton v. Newton (Minn., 1891), 48 N. W. Rep. 450; Haskins v. Warren, 115 Mass. 514.

² Holt v. Kirby (Ark., 1893), 21 S. W. Rep. 432; White v. Benjamin, 138 N. Y. 623.

³ McKenzie v. Oregon I. Co., 5 Wash. C. C. 500.

⁴ Morris v. Davies, 3 C. & P. 215.

⁵ Hoge v. Fisher, 1 Pet. C. C. 163. Insanity being pleaded as a matter of defense in an action *ex contractu*, the burden of proof is upon the defendant to show insanity (Young v. Lamont (Minn., 1893), 57 N. W. Rep. 478; Brown v. Brown, 39 Mich. 792; Weed v. Life Ins. Co., 70 N. Y. 561; Jarrett v. Jarrett, 11 W. Va. 562; Perkins v. Perkins, 39 N. H. 163; Wright v. Wright, 139 Mass. 177), and remains on him, though if by evidence he shows insanity, then the party denying the insanity will be obliged to prove by the weight of evidence either that the insanity

had ceased to exist or that a lucid interval had occurred. Wright v. Wright, *supra*.

⁶ Plano M. Co. v. Root (N. D., 1893), 54 N. W. Rep. 924; Cook v. Tavenier, 41 Ill. App. 642.

⁷ Lotto v. Dans (Minn., 1892), 52 N. W. Rep. 130.

⁸ In the following cases the burden of proof has been held to rest on the plaintiff: To show breach of a contract or covenant: Western Union T. Co. v. Bennett, 1 Tex. Civ. App. 558; Landt v. Mayor (Colo., 1893), 31 Pac. Rep. 524. Damages for negligence: Richmond, etc. Co. v. White, 88 Ga. 805. Infringement of a patent: National Harrow Co. v. Hanby, 54 Fed. Rep. 493. *Ultra vires*, when ground for a writ of *quo warranto*: Ellerman v. Stockyards (N. J., 1892), 23 Atl. Rep. 257. Performance of contract when performance is denied: Hitchcock v. Davis, 87 Mich. 629. Possession in trespass to try title: Gunn v. Harris, 88 Ga. 439. Receipt of money by the defendant in conversion: Panama R. Co. v. Johnson, 63 Hun, 629. Notice of a defect in highway to a city: McGrail v. Kalamazoo, 94 Mich. 52.

In these cases the burden is on the

§ 251. **When plaintiff may open and close.**—The general rule being that the burden of proof is upon the plaintiff, it follows that he has the right to open and close in most cases.¹ This is true though there may be *several issues* and the plaintiff may have the burden of proof on only one of them.² In actions on contracts either express or implied, where the defendant does not deny the execution or validity of the contract but pleads an affirmative defense such as payment, or breach of contract by the plaintiff, and where substantial damages are claimed which the contract has not liquidated, the plaintiff has the burden of proving damages and the consequent right to open and close.³ The rule that the plaintiff has the right to open and close in cases where the damages are unliquidated is also invoked in actions in tort. The fact that the defendant does not plead the general issue, but admits the cause of action and pleads a defense by way of confession and avoidance, does not, *unless he also admits the amount of damages which are claimed*, deprive the plaintiff of his right

defendant: To show truth (Nelson v. Wallace, 48 Mo. App. 193) or the bad reputation of plaintiff in libel: Lotto v. Davenport (Minn., 1892), 52 N. W. Rep. 130. Justification in assault: Jennison v. Mosely (Miss., 1892), 10 S. Rep. 592. Prior use or want of invention in patent cases: Hunt Bros. v. Cassidy, 7 U. S. App. 424; Anderson v. Monroe, 55 Fed. Rep. 596. Exemption of homestead: Kolsky v. Loveman (Ala., 1892), 12 S. Rep. 720; Wagner v. Olson (N. D., 1893), 54 N. W. Rep. 286; Robertson v. Robertson (Ky., 1893), 20 S. W. Rep. 543. Condonation in divorce proceeding: McConnell v. McConnell (Neb., 1893), 55 N. W. Rep. 292. A corporation must show its title in *quo warranto*: Ginterman v. People (Ill., 1892), 28 N. W. Rep. 1067. Abandonment of easement on party alleging it: Henessy v. Murdock, 137 N. Y. 317. Freedom from negligence on carrier: Central R. & B. Co.

v. Hossalkus (Ga., 1893), 17 S. E. Rep. 838.

¹ Railway Co. v. Rhea, 44 Ark. 258, 264; St. Louis, I. M. & S. Ry. Co. v. Taylor (Ark., 1893), 20 S. W. Rep. 1083; Felts v. Clapper, 69 Hun. 373.

² Shaw v. Barnhart, 17 Ind. 183; Bertrand v. Taylor, 32 Ark. 470; Auerbach v. Peetsch, 18 N. Y. S. 452; Johnson v. Maxwell, 87 N. C. 18.

³ Thompson on Trials, § 232; Stirnes v. Schofield (Ind., 1892), 31 N. E. Rep. 480; Whitesides v. Hunt, 97 Ind. 191; Mizer v. Bristol, 30 Neb. 138; Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 61; Graham v. Gautier, 21 Tex. 112; Mercer v. Whall, 5 Ad. & El. (N. S.) 447; Bates v. Farelet, 89 Mo. 121; Hurley v. Sullivan, 137 Mass. 86; Dahlman v. Hammel, 45 Wis. 466; McBee v. Bowman, 89 Tenn. 132; Mathews v. Farnies, 91 Ala. 157.

to open and close.¹ Thus, in an action to recover for slander or libel, where the defendant admits that he uttered the libelous or slanderous language which is alleged, but pleads the truth in justification, or that the statements were privileged, he is not entitled to the right to open and close, for the burden of proving malice and the amount of damages, if any, is still on the plaintiff.²

Cases occur which do not arrange themselves under the head of actions in contract or in tort, but in which the moving party applies merely to set aside some prior judicial or other official determination or action, or objects to that which is proposed or anticipated. The rule here invoked is that, as the burden of proof is on him who would change the existing condition of things, the applicant or party protesting will therefore have the right to open and close. Thus, a contestant of an election,³ interpleading claimants in attachment,⁴ or a party who files objections to the settlement of an executor,⁵ or excepts to the report of an auditor,⁶ or who applies for a *supersedeas*⁷ or a license,⁸ has the right to open and close.⁹

¹ *Stirnes v. Schofield* (Ind., 1892), 31 N. E. Rep. 411; *Young v. Highland*, 9 Gratt. (Va.) 16; *Mercer v. Whall*, 5 Ad. & El. (N. S.) 447; *St. Louis, I. M. etc. Co. v. Taylor* (Ark., 1893), 20 S. W. Rep. 1083; *Beatty v. Hatcher*, 13 Ohio St. 115; *Stillwell v. Archer*, 18 N. Y. S. 888; *Cunningham v. Gallegher*, 61 Wis. 170; *Aurora v. Cobb*, 21 Ind. 493; *Opdyke v. Weed*, 18 Abb. Pr. 223.

² *Tallmadge v. Press*, 14 N. Y. S. 331; *Burkhalter v. Coward*, 16 S. C. 435; *Hecker v. Hopkins*, 16 Abb. Pr. (N. Y.) 301; *Vifquain v. Finch*, 15 Neb. 505; *Shulse v. McWilliams*, 104 Ind. 512; *Louisville C. Jour. v. Weaver* (Ky., 1892), 17 S. W. Rep. 1018; 1 *Thompson on Trials*, § 230, n. 3. The rule given in the text is applicable where the defendant pleads *son assault demesne* to an allegation of assault and battery. 1 *Thompson on Trials*, § 230; *Young*

v. Highland, 9 Gratt. (Va.) 16; *Seymour v. Baily*, 76 Ga. 338; *Johnson v. Josephs*, 75 Me. 544.

³ *Price v. Archuleta* (Colo., 1892), 29 Pac. Rep. 460.

⁴ *Sanger v. Flow*, 48 Fed. Rep. 152; 4 U. S. App. 32. *Cf.* *Central R. & B. Co. v. Cons. & Inv. Co.*, 32 S. C. 319; 33 *id.* 599.

⁵ *Clay v. Robinson*, 7 W. Va. 350.

⁶ *Arthur v. Gordon*, 67 Ga. 220.

⁷ *Pearsall v. McCartney*, 28 Ala. 110.

⁸ *Hill v. Perry*, 82 Ind. 128.

⁹ See, also, in attachment, *Dolan v. Armstrong*, 35 Neb. 339; *Jones v. Swank* (Minn., 1893), 53 N. W. Rep. 634. In *Huntington v. Conkey*, 33 Barb. (N. Y.) 218, the court thus sums up the rules bearing on the right to open and close: "*First.* The plaintiff in all cases where damages are unliquidated has the right to open and close. *Second.* Whenever

§ 252. When defendant may open and close.—In all cases where the burden of proof is on the defendant he has the right to open and close. This usually occurs where he admits all the facts upon which the plaintiff's cause of action is based, *including the amount of damages claimed*, whether liquidated or not,¹ and pleads payment,² usury,³ want of consideration,⁴ the bar of the statute of limitations,⁵ or some other defense in the nature of a justification or discharge.⁶

The defendant who seeks to open and close cannot claim to do so upon a sham plea or on one entirely unsupported by any evidence,⁷ but must show by his pleadings that he has the right to do so affirmatively and clearly, for the court will not examine all the pleadings in the case in order to ascertain where that right lies.⁸ But the denial of unnecessary averments which are in the complaint which the plaintiff would not be called

he has anything to prove on the question of damages or otherwise he may begin. *Third.* In cases where the damages are liquidated or depend on mere calculation, the party holding the affirmative may begin. *Fourth.* The affirmative in such case means the affirmative in substance, not in form, and on the whole record. *Fifth.* The denial of the right to begin to the party entitled to and claiming it is reversible error unless the court can see clearly that no injury or injustice resulted from the erroneous decision."

¹Updyke v. Weed, 18 Abb. Pr. 223.

²Truesdell v. Hoyle, 39 Ill. App. 532; Knapp v. Runals, 37 Wis. 135.

³Hoxey v. Green, 37 How. Pr. 97; Sammons v. Hawver, 25 W. Va. 678; Huntington v. Kinkey, 33 Barb. (N. Y.) 218; Suter v. Bank, 35 Neb. 372.

⁴McShane v. Braender, 66 How. Pr. (N. Y.) 294; Brown v. Tausick, 20 N. Y. S. 369.

⁵Maye v. Friedman, 69 N. Y. 608; Payne v. Hathaway, 3 Vt. 312.

⁶Lindley v. Sullivan (Ind., 1893), 33 N. E. Rep. 361; East Tenn. etc. Co. v. Fleetwood (Ga., 1893), 15 S. E. Rep. 778; Love v. Dickinson, 85 N. C. 5; Auerbach v. Peetsch, 18 N. Y. S. 452; Donahoe v. Rich, 2 Ind. App. 540; List v. Kortpeter, 26 Ind. 27; Lafayette Bank v. Metcalf, 29 Mo. App. 384; Chicago, etc. Co. v. Bryan, 90 Ill. 126; Rigdon v. Jordan, 81 Ga. 668; Johnson v. Bradstreet, 81 Ga. 425; Page v. Carter, 8 B. Mon. 192; Pingree v. Puckett, 35 S. C. 178; Seymour v. Baily, 76 Ga. 338; Maurice v. Warden, 54 Md. 233. The defendant must admit all of plaintiff's cause of action. A plea which is evasive or doubtful (Seymour v. Baily, 76 Ga. 338; Comp. v. Brown, 48 Ind. 575), or which alleges a modification of the cause of action (McConnell v. Kitchens, 20 S. C. 430), or which denies the alleged value of the subject-matter (Saunders v. Bridges, 67 Tex. 93), will not suffice.

⁷Vanzant v. Jones, 3 Dana (Ky.), 464; Boehm v. Lies, 18 N. Y. S. 577.

⁸Claffin v. Baer, 28 Hun (N. Y.), 204.

upon to prove will not deprive the defendant of his right to open and close.¹

To obtain the right to open and close, the defendant's admission of the plaintiff's cause of action must be seasonably made, usually before trial and by the pleadings.² Although this question was the subject of much discussion in the earlier cases, it is now well settled that whenever the plaintiff has anything to prove on the question of damages he has also the right to begin.³ But where the damages are liquidated, as in the case of an action brought on a promissory note,⁴ bill of exchange,⁵ order for the payment of money⁶ or insurance policy,⁷ the defendant who admits the cause of action has the right to open and close, for on him the law casts the burden of proving any affirmative defense which he may urge.

§ 253. Right to open and close in special proceedings.—In special proceedings the burden of proof and the correlated right to open and close are his "who seeks to alter the existing state of things."⁸ Thus, in proceedings to probate a will the proponent has the right to open and close in the first instance,⁹ though when the validity of the will is *prima facie* established by probate, the party who attacks it subsequently, whether in the same court or elsewhere, has the right to open and close, for the reason that he seeks to alter the *status quo*.¹⁰

The petitioner in a proceeding to condemn land for public purposes by virtue of the exercise of the right of eminent domain, or to assess damages for the taking thereof, has gen-

¹ *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236.

² *Mitchell v. Fowler*, 21 S. C. 298; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

³ *Smith, J.*, in *Huntington v. Conkey*, 32 Barb. 218; *Mercer v. Whall*, 9 Jur. 576.

⁴ *Crabtree v. Atchison* (Ky., 1893), 20 S. W. Rep. 260; *Ayrault v. Chamberlain*, 33 Barb. 229; *Bowen v. Spears*, 20 Ind. 146; *Brown v. Tausick*, 20 N. Y. S. 369; *Harvey v. Ellithorpe*, 26 Ill. 418; *Hudson v. Wetherington*, 79 N. C. 3.

⁵ *List v. Kortpeter*, 26 Ind. 27.

⁶ *Elwell v. Chamberlain*, 31 N. Y. 611.

⁷ *Viele v. Insurance Co.*, 26 Iowa, 10; *Brennan v. Security L. Ins. Co.*, 4 Daly (N. Y.), 296.

⁸ *Thompson on Trials*, § 239. See *ante*, § 248.

⁹ *Norton v. Paxton*, 110 Mo. 456; *Kennedy v. Upshaw*, 66 Tex. 442; *Perkins v. Perkins*, 39 N. H. 163; *Harrison v. Bishop*, 131 Ind. 161; *Wilbur v. Wilbur*, 129 Ill. 392; *Hardy v. Merrill*, 56 N. H. 227.

¹⁰ *In re Simcox*, 11 Pa. Co. Ct. R. 545.

erally the right to open and close; for the law casts on him the burden of showing by evidence the necessity for the taking and the value of the property appropriated.¹ The contrary is supported by some cases,² and generally the owner will have the right in any appellate proceeding to review the award.³

The burden of proof in criminal cases is, as we have seen, upon the prosecution, and for this reason, and because the accused is presumed to be innocent until he is proved guilty, the right to open and close belongs to the state irrespective of the nature of the defense, and even where the accused offers no evidence in his own behalf.⁴

§ 254. The right to open and close—When discretionary. Though a substantial unanimity of opinion exists that the right to open and close belongs to the party on whom is cast the burden of proof, the authorities are not harmonious upon the question whether a denial of the right is ground for a new trial. Many cases sustain the rule that the matter is wholly within the discretion of the trial court, being a matter of practice over which its jurisdiction is final and exclusive.⁵ But this general rule is sometimes qualified by the proviso that it is only applicable where a denial of the privilege has not resulted in prejudice, injustice or unfairness to the party.⁶ On the other hand, it is held that the denial of the right to open and close is a substantial error. The right is not a mere privilege, and discretionary, but absolute, and a refusal to permit its exercise cannot be disregarded on a motion for a new trial or on appeal.⁷ A statute granting the right to open and close

¹ Thompson on Trials, § 247; Gulf, etc. Co. v. Ross (Tex., 1891), 16 S. W. Rep. 536; Com'rs v. Trustees, 107 Ill. 489; Neff v. Cincinnati, 32 Ohio St. 215; Spring Valley, etc. Co. v. Drinkhouse, 92 Cal. 528.

² Dallas v. Chenault (Tex., 1891), 16 S. W. Rep. 173; Burt v. Wigglesworth, 117 Mass. 302; Springfield R. Co. v. Rhea, 44 Ark. 258.

³ Indiana, etc. Co. v. Cook, 102 Ind. 113; Omaha, etc. Co. v. Walker, 17 Neb. 432.

⁴ Thompson on Trials, § 243; Jar-

nagin v. State, 10 Yerg. (Tenn.) 529; State v. Millican, 15 La. Ann. 557. See § 249.

⁵ Gran v. Spangenberg (Minn., 1893), 54 N. W. Rep. 933; Cothran v. Forsyth, 68 Ga. 560; Lancaster v. Collins, 115 U. S. 222; Wade v. Scott, 7 Mo. 509; Fry v. Bennett, 28 N. Y. 324; Comstock v. Hadlyme, 8 Conn. 254; 8 id. 296.

⁶ Carpenter v. Bank, 119 Ill. 353.

⁷ Porter v. Still, 63 Miss. 357; Royal Ins. Co. v. Schuring, 87 Ky. 410; 9 S. W. Rep. 242; Millard v.

is, of course, mandatory;¹ but the party claiming it should do so promptly before any material progress has been made in the trial of the case.²

Thorn, 56 N. Y. 402; Elder v. Oliver, can, 35 S. C. 178; Thompson on 30 Mo. App. 575; Auerbach v. Trials, § 226.

Peetsch, 18 N. Y. S. 452; Colwell ¹Bertody v. Ison, 69 Ga. 317; Heff-
v. Brower, 75 Ill. 516; Creston v. ron v. State, 8 Fla. 73.

Walker, 26 Iowa, 205; Ashing v. ²McKibbon v. Folds, 38 Ga. 235;
Miles, 16 Ind. 329; Addison v. Dun- Mason v. Seitz, 36 Ind. 516.

CHAPTER XX.

STATUTE OF FRAUDS.

§ 261. Origin and nature of the statute.	§ 267. Articles of partnership.
262. Agreements relating to interests in land.	268. Form and character of the writing.
263. Partition of real property.	269. Wills required to be evidenced in writing.
264. Trusts in real and personal estate.	270. Agreements not within the statute of frauds which must be evidenced by writings.
265. Surrender or assignment of leases.	
266. Contracts required to be in writing.	

§ 261. **Origin and nature of the statute.**— The statute of frauds and perjuries which was passed in England in the twenty-ninth year of Charles II. (1678), and which has been substantially re-enacted in every state of the American Union, was the means of introducing into the law of evidence a new mode of proof that renders its consideration of great importance. The spread of commerce and the complexity of social affairs had rendered necessary, while the increased employment of writing had made possible, the use of documentary evidence in a large class of cases in which it had not before been employed. The object of the statute is to prevent fraud. This, it is conceived, will be most effectually accomplished by requiring that certain transactions shall be evidenced in writing, which is then presumed to be the best evidence of the intention of the parties. Accordingly, where it is alleged that any one of the various classes of transactions or contracts which are within the statute have been made, a writing evidencing it must be produced or the party claiming the execution of the contract will be denied a legal remedy. The various statutes of frauds in the several states differ in minor points, while a substantial similarity exists among all of them. Though their consideration in detail is impossible in this work, attention may be called to some of their more salient features.

§ 262. **Agreements relating to interests in land.**— By the statute all contracts to convey land and all conveyances of land or of any interest in land, freehold or less than freehold, future or immediate, vested or contingent, except leases for three years or less, are required to be in writing. In construing this provision the main difficulty has been to ascertain the meaning of the words “land or an interest therein,” and to ascertain what was conveyed or sold, so as to render a writing necessary. An agreement to convey,¹ or to create an easement,² or a license to go upon land,³ or to relinquish an interest in land,⁴ or to buy lands jointly with another,⁵ or to refrain from bidding at an auction sale of land,⁶ or to take away a certain amount of bark yearly from trees,⁷ is within the statute and must be evidenced in writing. On the other hand it has been held that an agreement between adjacent owners to establish boundaries,⁸ or a partnership settlement by which land is conveyed,⁹ or a partnership formed to deal in land,¹⁰ may be shown by parol evidence.

Parol contracts for the sale of land will be valid and enforceable in equity where there has been a partial performance by the party seeking the enforcement of the contract, either by his payment of the consideration and going into possession of the land or by making valuable improvements thereon, or by both.¹¹ Upon the question whether a sale of

¹ Hayes v. Fine, 91 Cal. 391.

² Clanton v. Scruggs (Ala., 1892), 10 S. Rep. 757; May v. Prendergast, 12 Pa. Co. Ct. R. 220.

³ Cook v. Stearns, 11 Mass. 533. As respects the necessity for writing to convey lands prior to the statute, see Tiedeman on R. P., § 783.

⁴ Littell v. Jones (Ark., 1892), 19 S. W. Rep. 497.

⁵ Morton v. Nelson (Ill., 1893), 32 N. E. Rep. 916.

⁶ Roughton v. Rawlings, 88 Ga. 819.

⁷ Thompson v. Poor, 67 Hun, 653.

⁸ Archer v. Helm (Miss., 1892), 11 S. Rep. 3; Lecomte v. Tondorize, 82 Tex. 208; Cavanaugh v. Jackson, 91 Cal. 580.

⁹ Murrell v. Mandelbaum (Tex.), 19 S. W. Rep. 880.

¹⁰ Speyer v. Desjardins (Ill., 1893), 32 N. E. Rep. 283; Fountain v. Menard (Minn., 1893), 55 N. W. Rep. 601; Bates v. Babcock, 95 Cal. 479; Case v. Seger, 4 Wash. St. 492; Steven v. Wallace, 64 Hun, 288; Clarke v. McAuliffe, 81 Wis. 244.

¹¹ Barnes v. Bost. etc. Co., 130 Mass. 388; Hanlon v. Wilson, 10 Neb. 138; Marshall v. Peck, 91 Ill. 187; Wallace v. Rappleyea, 103 id. 229; Ford v. Finney, 35 Ga. 258; Cole v. Cole, 41 Md. 301; Sowry v. Buffington, 6 W. Va. 249; Reynolds v. Reynolds, 45 Mo. App. 622; Smith v. Arthur, 110 N. C. 400; Moulton v. Harris, 94 Cal. 420; St. Louis R. Co. v. Graham,

growing timber or crops must be evidenced by a writing the decisions are inharmonious. The English cases hold that if an immediate removal and severance by the vendor are contemplated no writing is requisite, as the transaction can and ought to be deemed a sale of goods alone.¹ The American courts hold that "standing trees are a part of the inheritance, and can only become personalty by actual severance or by severance in contemplation of law as the effect of a proper instrument in writing."² If in the sale of the timber or of growing crops or fruits a *severance and delivery* of the trees or crops as chattels by the vendor are not contemplated, but the vendor is given, either expressly or by implication, a license to go on the land and cut and receive them, then it is only reasonable to require that the contract conferring the license or *quasi*-lease must be evidenced by a writing,³ where its duration exceeds the term for which a valid oral lease can be made.

§ 263. Partition of real property.—Whether a partition among co-tenants may be effected and proved by parol is a question upon which considerable variance exists among the authorities. Prior to the enactment of the statute of frauds partition among coparceners and tenants in common of corporeal hereditaments might have been made by parol coupled with livery of seizin in severalty. According to the English cases and the early American decisions, a voluntary partition

55 Ark. 294; Guthrie v. Anderson, 48 Kan. 381; Frank v. Riggs, 93 Ala. 252; Larsen v. Johnson, 78 Wis. 300.

"Every day's experience more fully demonstrates that the statute was founded in wisdom and absolutely necessary to preserve the titles to real property from the chances, the uncertainty and the fraud attending the admission of parol testimony. When courts of equity have relaxed the rigid requirements of the statute, it has always been for the purpose of hindering the statute made to prevent frauds from becoming the instrument of fraud." Purcell v. Miner, 4 Wall. 517.

¹ Tiedeman on Real Prop., § 799;

Smith v. Surman, 9 B. & C. 561; Watts v. Bruce, 10 B. & C. 446; Marshall v. Green, 33 L. T. Rep. (N. S.) 404; Evans v. Roberts, 5 B. & C. 836; Bostwick v. Leech, 3 Bay (Conn.), 476; Warwick v. Bruce, 2 M. & S. 205.

² Tiedeman on Real Prop., § 799; Trull v. Fisher, 28 Me. 548; Green v. Armstrong, 1 Denio, 550; McGregor v. Brown, 10 N. Y. 117; Vorebeck v. Roe, 50 Barb. 305; Buck v. Pickwell, 27 Vt. 104; Hirth v. Graham (Ohio, 1893), 33 N. E. Rep. 90; Delaney v. Root, 99 Mass. 548; Poor v. Oakman, 154 Mass. 316.

³ Tiedeman on Real Prop., § 799; 1 Greenl. on Ev., § 271.

of land was considered to be a conveyance which, coming under the operation of the statute of frauds, must necessarily be in writing; and the courts demanded, therefore, that a party alleging the fact of a partition must prove that fact by evidence in writing.¹ But the contrary proposition, that a parol partition is valid where it is carried out and is followed by an actual and exclusive possession of the parcels in severalty, is supported by the more recent cases. The exclusive adverse possession in severalty, if it is continued long enough to bring the case within the statute of limitation, or if it is coupled with the making of extensive improvements by one of the former co-tenants on the portion which has been set out to him in severalty, would be sufficient in equity or law to take the case out of the statute of frauds and to dispense with written evidence.² In the New England States the proprietors of common lands could make partition by an oral vote and without actual possession in severalty. No writing was required to evidence a title arising under such a partition.³

§ 264. Trusts in real and personal estate.—Prior to the enactment of the statute of frauds, oral evidence was admissible to prove an express trust in real property. By that statute it is required that all express declarations of trusts in land shall be manifested and proved by a writing signed by the party creating the trust. The statute covers all express trusts;⁴

¹ Co. Lit. 187*a*; 2 Cruise, 384; Pipes v. Buckner, 51 Miss. 848; Johnson v. Johnson, 65 Tex. 87; McConnell v. Carey, 48 Pa. St. 430; Dockterman v. Elder, 27 Wkly. Law Bul. 154; Den v. Longstreet, 18 N. J. L. 414; Porter v. Perkins, 5 Mass. 235; 195; Bolling v. Teel, 76 Va. 487; Medlin v. Steele, 75 N. C. 154; Dow v. Jewell, 18 N. H. 380; Gratz v. Gratz, 4 Rawle (Pa.), 411; Jones v. Reeves, 6 Rich. (S. C.) 132; Wright v. Cane, 18 La. Ann. 579; Craig v. Taylor, 6 B. Mon. (Ky.) 459; Tiedeman on Real Prop., § 260.

² Tiedeman on Real Prop., § 260; 396; Coburn v. Ellenwood, 4 N. H. Meacham v. Meacham (Tenn., 1892), 99; Corbett v. Norcross, 35 id. 99; 19 S. W. Rep. 757; Bruce v. Osgood, Springfield v. Miller, 12 Mass. 415.

³ Folger v. Mitchell, 3 Pick. (Mass.) 4 Tiedeman on Eq., § 296; Collar v. Collar, 86 Mich. 507; 49 N. W. Rep. 507; In re Groome, 94 Cal. 69; 113 Ind. 360; Brown v. Wheeler, 17 29 Pac. Rep. 487; Wolford v. Farn-

but implied, resulting and constructive trusts are excepted either expressly or by implication,¹ and may be proved by parol. It is never necessary that the express trust should be created in writing, for, as the writing is only required for proof, it may operate as an admission of the existence of the trust.² The evidence must be clear,³ for if the language of the writing is uncertain, vague or fragmentary, parol evidence will not be received to supply the omissions.⁴ Personal or business correspondence, indorsements and admissions by parties in pleadings have been held sufficient as written proof of an express trust.⁵ Trusts in personal property are not within the statute of frauds and may be proven by parol evidence without the introduction of any memorandum or other writing whatever.⁶

ham, 44 Minn. 159; Bragg v. Paulk, 42 Me. 502; Hall v. Young, 37 N. H. 134; Daily v. Kinsler, 31 Neb. 340; Pinney v. Fellows, 15 Vt. 525; Patton v. Beecher, 62 Ala. 579; Spies v. Price, 91 Ala. 166; Watson v. Pinckney, 18 N. Y. S. 790; Faxon v. Folvey, 110 Mass. 392; Packard v. Putnam, 57 N. H. 43; Gibson v. Foote, 40 Miss. 783; Wadd v. Hazleton, 137 N. Y. 213; Tollarson v. Blackstock, 11 S. Rep. 284 (Ala., 1892); Renz v. Stoll, 94 Mich. 377; Hamilton v. Buchanan (N. C., 1893), 17 S. E. Rep. 159; Kinsey v. Bennett (S. C., 1893), 15 id. 965.

¹ Holland v. Farthing (Tex., 1893), 21 S. W. Rep. 67; Franckston v. Deering, 41 N. H. 443; Gee v. Gee, 32 Miss. 190; Merchon v. Duer, 40 N. J. Eq. 333; Brown v. Case, 23 S. C. 231; Burdette v. May, 100 Mo. 13; Seiler v. Mohn, 37 W. Va. 507; Rice v. Pennypacker, 5 Del. Ch. 33; Heneke v. Floring, 114 Ill. 554; Price v. Kane, 112 Mo. 412; Larmon v. Knight, 140 Ill. 232; 29 N. E. Rep. 1116; Hudson v. Wight, 17 R. I. 519; Curd v. Williams (Ky., 1892), 18 S. W. Rep. 634; Sasser v. Sasser, 73 Ga. 275. For further citations see Tiedeman on Real Prop., § 507.

² McClellan v. McClellan, 65 Me. 500; Trapnall v. Brown, 19 Ark. 48; Moran v. Hayes, 1 Johns. Ch. 339; Phipard v. Phipard, 55 Hun, 433; Orleans v. Chatham, 2 Pick. 29; Guion v. Williams, 7 N. Y. S. 786; Cornelius v. Smith, 55 Mo. 528; Pinney v. Fellows, 15 Vt. 525.

³ Rogers v. Rogers, 87 Mo. 257; Hoover v. Hoover, 129 Pa. St. 201; 19 Atl. Rep. 854.

⁴ Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Chadwick v. Perkins, 3 Me. 399; Russell v. Switzer, 63 Ga. 711; Abell v. Radcliffe, 13 Johns. 297; Chase v. Stockett (Md., 1890), 19 Atl. Rep. 761.

⁵ McCandless v. Warner, 26 W. Va. 754; Fisher v. Fields, 10 Johns. 495; Barron v. Barron, 24 Vt. 375; Hellman v. McWilliams, 70 Cal. 449; Moore v. Pickett, 63 Ill. 138; Bates v. Hurd, 65 Me. 180; Johnson v. Delaney, 35 Tex. 42; Loring v. Palmer, 118 U. S. 321; Macy v. Williams, 55 Hun, 489; Weaver v. Emigrant, etc. Co., 17 Abb. N. C. 82. See Tiedeman on Real Property, §§ 506, 507, where the subject is treated in full.

⁶ Conn. River Bank v. Albee, 64 Vt. 571; Chace v. Chace, 130 Mass. 128; Maffitt's Adm'r v. Reynold, 69

§ 265. Surrender or assignment of leases.—It is also generally provided by the statute of frauds that no leases or other interests in lands of any sort, save in copyhold lands, can be *assigned, granted or surrendered* except in writing signed by the party.¹ The effect of the statute is to abrogate the common-law rule that leases for life or years could be surrendered by parol, and such surrender or the assignment of such interests must now be evidenced in writing under the statute.² The common law, prior to the statute, proceeding upon the principle that estates in incorporeal hereditaments, as easements and estates less than freehold, depended for their validity upon a written grant and not upon feoffment and livery of seizin, recognized the rule that such interests might be surrendered by the destruction of the deed or other writing by which they were created. The assimilation under the statute of the proof which is required to evidence incorporeal and corporeal interests should not, however, be construed to render the cancellation of a deed conveying a corporeal estate equivalent to a surrender of the same. The deed, properly recorded, is but evidence of a transfer of title, and a conveyance under seal of a similar character is required under the statute to evidence the retransfer or surrender of the vested interest.³ But the redelivery to the grantor of an unrecorded deed by which no title has passed might, under certain peculiar and very exceptional circumstances, operate as a reconveyance, working an estoppel on the grantee, when the interests of third persons had become vested in the land.⁴

Pa. St. 380; Gadsden v. Whaley, 14 S. C. 210; Roch v. George's Adm'r (Ky., 1893), 20 S. W. Rep. 1089; Davis v. Coburn, 128 Mass. 377; Eaton v. Cook, 25 N. J. Eq. 55; Silvey v. Hodgdon, 52 Cal. 363; Ray v. Simmons, 11 R. I. 266; Hawkins v. Gardiner, 2 Sm. & Gif. 441; Hon. v. Hon, 70 Ind. 135.

¹ Chicago Attachment Co. v. Davis (Ill., 1892), 28 N. E. Rep. 859. If a lease is under seal the surrender must also be under seal. Jackson v. Gardner, 8 Johns. 404; Kiester v.

Miller, 25 Pa. St. 481; Breher v. Reese, 17 Ill. App. 545.

² McClelland v. Rush, 11 Pa. Co. Ct. R. 188; Nally v. Reading, 107 Mo. 150; 17 S. W. Rep. 978; State v. Ervien (N. J., 1888), 12 Atl. Rep. 136.

³ § 262.

⁴ 1 Greenl. on Ev., § 265, citing Farrar v. Farrar, 4 N. H. 191; Com. v. Dudley, 10 Mass. 403; Hobb Brook v. Turrell, 9 Pick. 105. Upon the question of the necessity for the use of a sealed instrument to pass a freehold, see Tiedeman on Real Property, § 783.

§ 266. **Contracts required to be in writing.**—The statute of frauds also requires that every contract by an executor or administrator to answer out of his own estate, all promises to answer for the debt, default or miscarriage of another person, agreements in consideration of marriage, contracts not to be performed within a year, and contracts for the sale of goods not exceeding in value the sum of £10 or \$50, must be evidenced by a writing signed by the party to be charged or his agent.¹ In the case of a sale of goods a writing is not required where the buyer has received part of the goods or has paid earnest-money.²

§ 267. **Articles of partnership.**—It is not necessary that a contract of partnership or an assignment of a share therein should be evidenced in writing.³ If the existence of the partnership is not to commence within one year,⁴ or if its duration is to be more than one year,⁵ the transaction must be in writing under the statute. But a part performance of an oral contract of partnership is sufficient to take it out of the statute.⁶ A partnership formed to carry on the business of buying and selling land need not, according to the current of the decided cases, be proved by a writing,⁷ though it seems that where the partners contribute as their shares of the partnership fund lands held by them individually, or as tenants in common, a writing is necessary as evidence of what amounts to a conveyance of lands.⁸

Where real estate is purchased and used for partnership purposes, being paid for with the money of the firm, it becomes partnership property. Such a transaction need not be evidenced by a writing signed by all the partners, for if the con-

¹ 1 Greenl. on Ev., § 267.

² 2 Kent's Com. 493-495; 1 Greenl. on Ev., § 267.

³ Buckner v. Ries, 34 N. Y. 344; Jack v. Clemens, 41 Iowa, 95; Jordan v. Miller, 75 Va. 442; Buffum v. Buffum, 49 Me. 108.

⁴ Williams v. Jones, 5 B. & C. 108.

⁵ Morris v. Peckham, 51 Conn. 128.

⁶ Yates v. Fraser, 6 Ill. App. 229; Huntley v. Huntley, 114 U. S. 394.

⁷ Holmes v. McCray, 51 Ind. 358;

Snyder v. Wolford, 38 Minn. 175; Pennypacker v. Leary, 65 Iowa, 230; Knott v. Knott, 6 Oreg. 142; Bunnell v. Taintor, 4 Conn. 568; Hunter v. Whitehead, 42 Mo. 524; Carr v. Gravitt, 54 Mich. 540. *Contra*, Gantt v. Gantt, 6 La. Ann. 667; Smith v. Burcham, 3 Sumn. (U. S.) 435.

⁸ Larkins v. Rhodes, 5 Port. (Ala.) 195; Clancy v. Cranie, 2 Dev. Eq. (N. C.) 363.

tract was signed by and the title taken in the name of one, he will be regarded as a trustee for his associates.¹

§ 268. **Form and character of the writing.**—No particular form is required for any writing evidencing a contract necessary under the statute, and several incomplete or fragmentary documents may be sufficient if on being construed together the existence of the contract can be ascertained with reasonable certainty. But parol evidence is inadmissible to supply words which have been omitted,² though it may be received to show that a consideration passed where none is expressed in the writing.³ The statutory requirement is that the writing should be signed, not by both the parties, but “by the party to be charged” alone. The plaintiff who is seeking to enforce his right need not therefore have signed the writing which he seeks to use as evidence. The position of the signature is immaterial. The printed name of the vendor in a bill will suffice if the name of the vendee and the items are in writing.⁴ Except in the case of the execution of a conveyance of land, a writing signed by an agent or attorney will not be invalidated because his authority was created by parol. So an agent may be verbally authorized to enter into a written contract for the sale of land belonging to his principal.⁵ But an authority to execute a deed or instrument under seal must have been created by a deed, and no writing not under seal will be received as evidence of the existence of such an authority.⁶ An auctioneer immediately after the descent of the hammer

¹ *Bryant v. Hunter*, 6 Bush (Ky.), 75; *Hogle v. Lowe*, 12 Nev. 286;

Rank v. Grote, 50 N. Y. Super. Ct.

175; *Dewey v. Dewey*, 35 Vt. 555;

Martin v. Morris, 62 Wis. 418;

Brooke v. Washington, 8 Gratt. (Va.)

248; *Cilley v. Huse*, 40 N. H. 358;

Campbell v. Campbell, 30 N. J. Eq.

415; *Tillinghast v. Champlin*, 4 R. I.

173; *Jones v. Smith*, 31 S. C. 527;

Hardy v. Norfolk Mfg. Co., 80 Va.

404; *Kimberly v. Arms*, 129 U. S.

512; *Paige v. Paige*, 71 Iowa, 318;

Tenny v. Simpson, 37 Kan. 353;

Divine v. Mitchum, 4 B. Mon. (Ky.)

488.

² 2 Kent's Com. 511; 1 Greenl. on Ev., § 268.

³ *Packard v. Richardson*, 17 Mass.

122; *Drake v. Seaman*, 97 N. Y. 230.

Cf. Hayes v. Jackson, 37 Cent. L. J.

298.

⁴ 1 Greenl. on Ev., § 268.

⁵ *Dickerman v. Aston*, 21 Minn.

538; *Warrall v. Munn*, 5 N. Y. 229;

Moody v. Smith, 70 N. Y. 598; *Riley*

v. Minor, 29 Mo. 439; *Wharter v.*

McMahan, 10 Paige (N. Y.), 386;

Rottman v. Wasson, 5 Kan. 552;

Long v. Hartwell, 34 N. J. L. 116.

⁶ *Wheeler v. Nevins*, 34 Me. 54;

Preston v. Hall, 23 Gratt. (Va.) 600;

begins to act as agent for the buyer, and his signature or memorandum in any transaction, whether concerning real or personal property, will bind both parties as a note in writing under the statute.¹

§ 269. Wills required to be evidenced in writing.—By the fifth section of the statute of frauds it was prescribed that all devises of lands or tenements must be in writing, signed by the person devising or by some one in his presence and by his express direction, and they should be attested and subscribed in his presence by three or four witnesses. Before the Victorian statute of wills,² testaments disposing of personal property only were valid if they had been reduced to writing before the death of the testator, though never signed or seen by him and without any authentication or attestation. This statute, which placed wills of personalty and devises upon the same footing so far as their ceremonial execution is concerned,³ has been followed by similar enactments in almost every state of the American Union.⁴ A will disposing of real or personal property must therefore, except in those exceptional cases where nuncupative wills are permitted, be in writing signed or subscribed by the testator in the presence of two witnesses at least, who must then usually sign as witnesses in the presence of the testator, and frequently they are required to sign in the presence of each other. The courts in construing these statutes regulating the execution of wills, which

Wells v. Evans, 20 Wend. (N. Y.) 251; Damon v. Granby, 2 Pick. (Mass.) 345; Harshaw v. McKesson, 65 N. C. 688; Adams v. Power, 52 Miss. 828; Desp. Line v. Bellamy M. Co., 12 N. H. 205; Rhode v. Louthain, 8 Blackf. (Ind.) 413; Smith v. Perry, 29 N. J. L. 74; Rowe v. Ware, 30 Ga. 278; Scheutze v. Baily, 40 Mo. 69; Gordon v. Buckley, 14 S. & R. (Pa.) 331; Cain v. Heard, 1 Coldw. (Tenn.) 163. But a deed executed by an agent without authority under seal, though invalid as a legal conveyance, may be used as evidence of an equitable title. Watson v. Sherman, 84 Ill. 263; Ingram v. Little,

14 Ga. 173; Jones v. Marks, 47 Cal. 242.

¹ Smith v. Arnold, 5 Mason (U. S.), 414; Morton v. Dean, 13 Met. (Mass.) 338; White v. Crew, 16 Ga. 416; White v. Watkins, 23 Mo. 423; Walker v. Herring, 21 Gratt. (Va.) 678; Cleaves v. Foss, 4 Greenl. (Me.) 1; Linn, Boyd, etc. Co. v. Terrill, 13 Bush (Ky.), 463; Anderson v. Check, 1 Bailey Eq. (S. C.) 118; Harvey v. Stevens, 43 Vt. 653.

² 1 Vic., ch. 26.

³ See Tiedeman on Wills, § 46 et seq., where the subject is fully discussed.

⁴ Stimson, Am. St. Law, § 2640.

differ somewhat in minor details in the several states, have usually been satisfied with a substantial compliance with their provisions.¹ Any act of the testator by which a sign or mark is made upon the paper by him or for him at his request evincing his intention that the instrument shall take effect as his will is enough.²

The statutory provisions differ as to the position of the signature. The statute of frauds and the American statutes which are remodeled on it are satisfied with a signature in any part of the will, while other statutes require a signing or subscription at the foot or end of the will. If it is required that the will should be subscribed at the end, a signing which precedes any dispositive part of the will is not a valid subscription. But a substantial compliance with the statute is all that is required;³ and the fact that the subscription is near, or in or under the attestation clause is not material.⁴

The witnesses are usually required to subscribe the will in the presence of the testator. As to what shall constitute this presence the cases are not altogether harmonious. The mere bodily presence of the testator is not enough. He must be conscious of what is going on about him or the attestation will be invalid.⁵ Very many of the cases sustain the very liberal statutory construction that the signing is in the presence of the testator, whether performed in the room where he is or not, if he can see the act of signing if he wished to do so.⁶ But other authorities hold that where the attestation takes place in another room, in order to make it a signing in the testator's presence

¹ In re Phelps, 98 N. Y. 267; McDonough v. Loughlin, 20 Barb. 238; In re Guilfoyle, 96 Cal. 598; Montgomery v. Perkins, 2 Met. (Ky.) 418.

² Baily v. Baily, 35 Ala. 687; Sprague v. Luther, 8 R. I. 252; In re Guilfoyle, 96 Cal. 398; In re Shotwell, 11 Pa. Co. Ct. R. 444; In re Knox, 131 Pa. St. 220; Jenkyns v. Gaisford, 32 L. J. Prob. 122; Tiedeman on Wills, §§ 47, 48, 49.

³ In re Voorhis, 125 N. Y. 765; Sticker v. Groves, 5 Whart. 386; In re Conway, 58 Hun, 16; In re Lam-

baerts, 10 Pa. Co. Ct. R. 10; In re Dayger, 47 Hun, 127.

⁴ Hallowell v. Hallowell, 88 Ind. 251; Younger v. Duffie, 94 N. Y. 535.

⁵ Right v. Price, Doug. 241; Graham v. Graham, 10 Ired. 219.

⁶ Green v. Green (Ill., 1893), 33 N. E. Rep. 941; Snider v. Burke, 84 Ala. 53; Pawtucket v. Ballou, 15 R. I. 58; Gallegher v. Kilkerry, 29 Ill. App. 415; Moore v. Spier, 80 Ala. 130; Turner v. Cook, 36 Ind. 129; In re Downie, 42 Wis. 66; Aiken v. Weekerly, 19 Mich. 482.

it is necessary to show that he actually did see the witnesses in the act of subscribing their names.¹ In many of the states by statute, and in some others as the result of judicial legislation, it is now required that the testator should publish his will in the presence of the witnesses. This he may do in express terms by informing the witnesses that the paper they are attesting is his will or by any signs or actions by which the knowledge of that fact is conveyed to them.²

§ 270. Agreements not within the statute of frauds which must be evidenced by writings.—By various modern statutes certain transactions not originally included within the statute of frauds are now required to be evidenced in writing. Thus, in New York, payment of money by executors, administrators or testamentary trustees is required to be shown by a written receipt.³ So, too, it is usually provided that a new promise, in order to be sufficient to take a debt out of the statute of limitation, must be in writing,⁴ and the same rule is applicable to the acceptance of a bill of exchange.⁵ A contract to make a will must, in Massachusetts, be in writing,⁶ as well as agreements to arbitrate,⁷ if the arbitration is sought to be enforced in a court of record. Notices in legal proceedings are often required to be in writing, as in the case of statutory notice to quit.⁸

So, too, by various federal statutes assignments of land warrants, wages due for naval service, of contracts with Indians, of patents and of copyrights are required to be shown by writing signed by the parties thereto. Written evidence is sometimes required of a contract of apprenticeship,⁹ and of the adoption of a child.¹⁰

¹ *Mandeville v. Parker*, 31 N. J. N. Y. L. 1873, p. 1243, ch. 830. The text enumerates in part only the transaction which should be evidenced by a writing. In *University*

² *Tiedeman on Wills*, § 52.

³ N. Y. Code C. P. 2734, 2750.

⁴ Mass. Pub. St. 1116, ch. 197, §§ 15, 16; Code C. P. 395.

⁵ 1 N. Y. R. S. 768, §§ 6, 8.

⁶ Mass. Pub. St. Sup. 746.

⁷ *Horton v. Wilde*, 8 Gray, 425.

⁸ 1 N. Y. R. S. 745, §§ 4, 11.

⁹ Mass. Pub. Stat. 827, ch. 149, § 5;
¹⁰ N. Y. R. S. 154.

Mass. Pub. Stat. 824, ch. 148, § 2; must be evidenced in writing.

CHAPTER XXI.

ATTENDANCE OF WITNESSES.

<p>§ 275. The attendance of witnesses at private arbitrations.</p> <p>276. The subpoena—Fees of witnesses.</p> <p>277. Fees in criminal cases.</p> <p>278. Subpoena <i>duces tecum</i>.</p> <p>279. Time and mode of serving the subpoena.</p> <p>280. Recognizance to secure presence of a witness.</p> <p>281. Obstructing attendance of witnesses.</p> <p>281a. Changing venue for convenience of witnesses.</p> <p>282. Failure of witnesses to attend—Continuance, when granted.</p>	<p>§ 283. Continuance in criminal trials.</p> <p>284. Non-attendance of witness—When a contempt.</p> <p>285. Privilege of witnesses from service of civil process.</p> <p>286. Privilege of witnesses from civil arrest.</p> <p>287. Duration of the privilege from arrest.</p> <p>288. Attendance of witnesses in custody.</p> <p>289. Attendance of witnesses before legislative bodies.</p>
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§ 275. **The attendance of witnesses at private arbitrations.**—It is hardly necessary to state that private individuals have no power to compel the attendance of witnesses except in the course of a judicial or legislative investigation. So private arbitrators cannot, in the absence of statutory authorization to that effect, procure the compulsory attendance of witnesses or the production of documentary evidence.¹ But when a statutory power is conferred on the arbitrators, the arbitration becomes a public and *quasi*-judicial proceeding. The arbitrator may then commit disobedient witnesses for contempt, and the witnesses, on the other hand, are privileged from civil arrest while in attendance at the arbitration,² or while going to or returning from it.

§ 276. **The subpoena—Fees of witness.**—The power of the court to hear and determine controversies confers by implication at common law the further power to require the pro-

¹ *Tobey v. Bristol*, 3 Story, 800; 257; *Sanford v. Chase*, 3 Cow. (N. Y. Webb v. Taylor, 1 D. & L. 676. 381; *People v. Judge*, 41 Mich. 726.

² *Clark v. Grant*, 2 Wend. (N. Y.) .

duction of evidence for or against the controverted facts.¹ The judicial power to summon witnesses is commonly exercised by the employment of a subpoena, which may be defined as "a judicial writ, directed to the witness, commanding him to appear at the court to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ."²

In England, and in most of the states of the Union, it is required by statute that the witness shall be tendered, when he is served with the subpoena, certain fees to cover his expenses incurred in going to and from the place of trial and while remaining there. In America these fees are usually fixed by statute,³ while in England the witness is allowed his living and traveling expenses, according to what may be his social position.⁴ The mileage which is allowed the witness is limited to his expenses incurred while traveling within the boundaries of the jurisdiction where he testifies, since the process of the court does not run beyond its jurisdictional limits, and his deposition would suffice in such a case.⁵ A witness whose expenses are not paid or tendered need not testify though he has obeyed the subpoena,⁶ except where it is provided by statute that his right thereto is waived by a compliance with the summons or the subpoena ticket.⁷ Either party to the suit who appears and testifies solely in his own behalf as a witness is not entitled

¹ The attendance of a witness before a commissioner who has been appointed to take his deposition by a court which has received letters rogatory from a court in a sister state may be secured by a subpoena or by an order in the nature of a subpoena. *State v. Bourne*, 21 Oreg. 218. See *post*, § 289.

² 1 Greenl. on Ev., § 309.

³ In *re Corwin*, 6 Abb. N. C. 437; *State v. Ramsay* (Mont., 1892), 28 Pac. Rep. 258.

⁴ 2 Phil. Ev., pp. 375, 376; 2 Tidd, p. 806; 3 Bl. Com. 369.

⁵ *Crawford v. Abraham*, 2 Oreg. 163; *Kingfreed v. Pullen*, 54 Me. 398; *Stern v. Herren*, 101 N. C. 516;

Gunnison v. Gunnison, 41 N. H. 121; *Fish v. Farwell*, 33 Ill. App. 242; *Melvin v. Whiting*, 13 Pick. 190. In the federal courts, if the distance traveled is not wholly within the district, mileage will only be allowed for one hundred miles and return. *The Progress*, 48 Fed. Rep. 239; *Buffalo Ins. Co. v. Steamship Co.*, 29 Fed. Rep. 237.

⁶ *Atwood v. Scott*, 99 Mass. 177; *Mattocks v. Wheaton*, 10 Vt. 493; *Newton v. Harland*, 9 Dowl. 16.

⁷ But ordinarily a witness does not lose his fees by not insisting on prepayment. *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 273.

to recover his fees or mileage as such,¹ or to have them taxed as costs, though the rule is otherwise if he is summoned to testify in behalf of his opponent,² and he need not testify until he is paid.³

Under peculiar circumstances a witness may be entitled to fees for his attendance in two or more simultaneous cases, as where he is summoned for the plaintiffs in different suits arising out of one subject-matter.⁴ The fees and mileage of witnesses are taxable as costs where they attend and testify, though they were not summoned;⁵ or where they are summoned in good faith and actually appear, though they may not be called upon to testify.⁶ The expense incurred by the witness in procuring a survey of the land which was the subject-matter of his evidence cannot be taxed as costs;⁷ nor is an attorney who testifies solely to free himself from an imputation of misfeasance entitled to witness fees.⁸

¹ Grinnell v. Dennison, 12 Wis. 402; Beal v. Stevens, 72 Cal. 451; Stratton v. Upton, 36 N. H. 581; Hale v. Merrill, 27 Vt. 738; Grub v. Simpson, 6 Heisk. (Tenn.) 92; Nichols v. Brunswick, 3 Cliff. (U. S. C. C.) 88; Delcomyn v. Chamberlain, 48 How. Pr. (N. Y.) 409.

² Goodwin v. Smith, 67 Ind. 101; Young v. English, 7 Beav. 10; Harvey v. Tebutt, 1 J. & W. 197; Penny v. Brink, 75 N. C. 68; Bonner v. People, 40 Ill. App. 628; Leeds v. Amherst, 14 Sim. 357. Cf. The Progress, 48 Fed. Rep. 239.

³ It has been held that the statutory fees for each day's attendance should be paid or tendered on the day preceding, and the failure of a party to do so will justify the witness in returning at once to his home. Bliss v. Brainard, 42 N. H. 255.

⁴ Young v. Insurance Co., 29 Fed. Rep. 273; Vernon, etc. Co. v. Johnson, 108 Ind. 128; Archer v. Insurance Co., 31 Fed. Rep. 660; The Vernon, 36 Fed. Rep. 113.

⁵ Christensen v. Union, 32 Pac.

Rep. 1018 (Wash., 1893); Cahn v. Monroe, 29 Fed. Rep. 675; The Syracuse, 36 Fed. Rep. 830. *Contra*, Stern v. Herren, 101 N. C. 516.

⁶ Fish v. Farwell, 33 Ill. App. 242; Ohio, etc. Co. v. Trapp (Ind., 1892), 30 N. E. Rep. 812; Baumbach v. Gessler, 82 Wis. 231; Chandler v. Beal, 137 Ind. 596; Young v. Insurance Co., 29 Fed. Rep. 273; Pugh v. Good (Oreg., 1890), 23 Pac. Rep. 827. But where thirty-two witnesses were summoned to impeach plaintiff's character the fees of only five were allowed, though all were admitted to have been called in good faith. Kley v. Healey, 2 N. Y. S. 231.

⁷ Tuck v. Olds, 29 Fed. Rep. 883.

⁸ Pearsman v. Gold (N. J., 1889), 8 Atl. Rep. 285. It is provided by the Revised Statutes of the United States, section 850, that no federal officer or clerk shall receive more than his necessary expenses when he is attending court as a witness for the government. *Ex parte* Burdell, 32 Fed. Rep. 681; *In re* Waller, 49 Fed. Rep. 271. In calculating mile-

§ 277. **Fees in criminal cases.**—The prosecution in a criminal proceeding is under no necessity of paying its witnesses their expenses, as in theory it is conceived to be the duty of every citizen to assist so far as lies in his power, without compensation or reward, in the punishment of wrongdoers. A statute, therefore, which provides that a witness is not entitled to fees in criminal cases does not conflict with a constitutional guaranty that no man's services shall be demanded without just compensation.¹ If, because of his poverty, a witness who is summoned in a criminal trial is unable to attend, he will not, it seems, be in contempt of court.² The prisoner on trial for a capital crime possessed, at common law, no right to compulsory process to obtain the attendance of his witnesses, while, if they attended voluntarily, that cruel system of jurisprudence gave the judge the discretion to refuse to permit their examination because they had not been legally summoned.³

By the provisions of the federal constitution and the constitutions of the several states, the right to compulsory process for obtaining the attendance of witnesses in his own behalf is secured to the prisoner;⁴ and it is often provided by statute that if he is acquitted his witness fees shall be paid by the county.⁵ So, too, a subpoena is not always essential; for if a witness, though not summoned, is in court, he may be

age the distance covered is measured as the crow flies (*Leigh v. Hind*, 17 E. C. L. 774), though sometimes it may be measured by the usually traveled route. *Smith v. Ingraham*, 7 Cow. 419. "The most direct route of travel" between two places, within the meaning of a statute giving a sheriff mileage for carrying prisoners to a penitentiary, is the railroad, although it is sixty-four miles long while the highway is but thirty-five. *Maynard v. Cedar County*, 51 Iowa, 431.

¹ *Daly v. Multnomah Co.*, 14 Oreg. 20. *Cf. Morin v. Multnomah Co.* (Oreg., 1889), 22 Pac. Rep. 490.

² *Greenl. on Ev.*, § 311; *United States v. Durling*, 4 Biss. 509.

³ *Abb. Crim. Brief*, citing *United States v. Reid*, 12 How. (U. S.) 361.

⁴ *Homan v. State*, 23 Texas, 212; *Willard v. Superior Court*, 82 Cal. 456.

⁵ *State v. Massy*, 104 N. C. 877; *State v. Willis* (Iowa, 1889), 44 N. W. Rep. 699. A statute which prescribes that a criminal trial shall not be postponed when either party thereto consents that the facts contained in an affidavit for a continuance shall be regarded as the evidence of the absent witness is unconstitutional, as it deprives a prisoner of his constitutional right to compulsory process. *State v. Berkley*, 92 Mo. 41. This constitutional right, however, is not absolute, and does not from

called to testify.¹ It has been held, however, that an attachment against a witness will not be granted the accused in the absence of a showing that the evidence is material,² and that the witness has been summoned, or that proper efforts 'have been made to procure his attendance, that he is in the state, and that his early presence can be secured.³ A witness who is subpoenaed and who testifies in behalf of a person accused of a felony may recover for his services in an action of *assumpsit*;⁴ though it also has been held that he is entitled only to the amount prescribed by statutory enactment as witness fees, even if the party had promised to pay more.⁵ If a witness becomes entitled to certain statutory fees on attending and testifying, his right thereto is a vested right which is protected by constitutional guaranties and which cannot be destroyed or impaired by any subsequent legislation.⁶

§ 278. *Subpoena duces tecum*.—Where the production of documentary evidence in the possession of the witness is required a subpoena *duces tecum* is employed, commanding him to search for and bring to court certain books or papers which are specifically described, together with all documents and writings which may afford evidence in the cause.⁷ The writ-

necessity include witnesses who are resident out of the state (State v. Pagels, 92 Mo. 300; 4 S. W. Rep. 931; State v. Hornsby, 8 Rob. (La.) 554), or those within the state whose deposition can easily be procured if they are unable to attend in person. Willard v. Superior Court, *supra*. If the venue is changed on the application of the state's attorney, the court may make it a condition that the traveling expenses of the defendant's witnesses who are too poor to pay their own expenses shall be provided for. People v. Baker, 3 Abb. Pr. 42; 3 Park. Crim. Rep. 181.

¹ Robinson v. Trull, 4 Cush. 249; Rex v. Sadler, 4 C. & P. 218; Blackburn v. Hargreave, 2 Lew. C. C. 259, cited in 1 Greenl. on Ev., § 311.

² People v. Marseiler, 70 Cal. 9.

³ State v. Johnson, 41 La. Ann.

574. Cf. State v. McCarthy, 43 La. Ann. 541.

⁴ Bennett v. Kroth, 37 Kan. 235.

⁵ Walker v. Cook, 33 Ill. App. 561.

In this connection it may be of service to define the word "witness." The term is a general one, including every person from whose lips testimony is received or extracted to be used in a judicial or quasi-judicial proceeding. An "affiant" or a "deponent" is always a witness, but every witness is of course not an affiant or deponent. Anderson's Law Dictionary, citing Barker v. Coit, 1 Root, 225 (Conn.); Bliss v. Shuman, 47 Me. 252.

⁶ People v. Pyper (Utah, 1889), 21 Pac. Rep. 722.

⁷ 1 Greenl. on Ev., § 309; 3 Bl. Com. 382.

ings which are required should be described specifically and with certainty according to the circumstances of the case, so that the witness, on the one hand, may know what is required of him, and the court, on the other, may ascertain if the subpoena has been properly obeyed.¹ The object of the writ is the production of documentary evidence alone, and a piece of metal or other article cannot be brought in court by a subpoena *duces tecum*;² nor can the writ be employed for the sole purpose of discovering a secret process of manufacturing a patented article,³ nor to compel the production of writings not as evidence but to refresh the memory of a witness.⁴ But disobedience to a subpoena *duces tecum* by a postoffice official is not excusable because the rules of his department forbid the disclosure by him of any information contained in its records.⁵

As the power to issue a subpoena *duces tecum* is derived from the power to command the production of a material witness "to testify," the omission of the words "to testify" will invalidate the subpoena itself.⁶ A witness in whose possession are papers which it is sought to produce by a subpoena *duces tecum* is not excusable for refusing or neglecting to bring them into court because they do not belong to him.⁷ If he is a custodian of public records, he may be excused from doing so in answer to a subpoena on account of the public in-

¹ Mitchell v. Sheriff, 7 Abb. Pr. 96; United States v. Babcock, 3 Dill. (U. S.) 568; Elting v. United States, 27 Ct. Cl. 158.

² Re Shepard, 18 Blatch. 266; Johnson v. North Branch Co., 48 Fed. Rep. 191.

³ Averell v. Barber, 63 Hun, 630.

⁴ United States v. Tilden, 10 Ben. 566, 570-581.

⁵ Rice v. Rice (Ala., 1893), 25 Atl. Rep. 21.

⁶ Murray v. Elston, 23 N. J. Eq. 212. In *Ex parte Moses*, 53 Fed. Rep. 346, it was held that the statutory power to issue a subpoena commanding a witness "to appear and testify" did not authorize the

issue of a subpoena *duces tecum*. While a subpoena *duces tecum* is unreturned or unserved, no second subpoena will be valid for the same purpose. Elting v. United States, 27 Ct. Cl. 158.

⁷ The mere assertion of corporate officials that the corporation's books are not in their possession is not sufficient to excuse their disobedience of an order of court for the production of the books where it appears that the books were lately in their possession, and they have failed to account for their disappearance. Fenlon v. Dempsey, 21 Abb. N. C. 291.

convenience which would very probably ensue, and because the writings in question may be satisfactorily proved by properly authenticated copies.¹ In any case the sufficiency of the reason for not producing a writing in obedience to a subpoena *duces tecum* is for the court.²

§ 279. **Time and mode of serving the subpoena.**—In justice to the witness the subpoena should be seasonably served. He should be given a reasonable opportunity so to arrange his business that it will not suffer greatly by his absence.³ It is now generally provided by statute in this country that the witness shall be allowed one day's time for every twenty miles he is compelled to travel from his place of abode to the place of trial. In every case, however, at least one day's notice is necessary.⁴ The subpoena should be served personally, that the witness, being apprised of its contents, may be chargeable with contempt for his disobedience to it. To constitute personal service the subpoena should be shown to the witness, and a copy thereof or a subpoena ticket containing a concise summary of its contents, with an oral statement of what the paper is, should be delivered to him together with his statutory fees.⁵

Service may be made by a private person as a party⁶ or by a sheriff or other official acting for a party to the suit. In the former case proof of service may be made by the affidavit of the person serving the writ; in the latter by the return of the officer.⁷ A subpoena is only valid to secure the attendance of a witness in the particular cause in which it has been issued, and is inoperative to secure his presence at a subsequent term to which the trial has been subsequently adjourned.⁸ Sometimes by statute a penalty is imposed upon a witness who fails or refuses to obey a subpoena which has been properly served on him. The penalty is recovered by a civil action brought against the witness by the party ag-

¹ See *ante*, §§ 142c, 146-150.

² 1 Whart. Ev., § 377.

³ In re Hughbanks, 44 Kan. 105.

⁴ Scammon v. Scammon, 33 N. H. 52; Sims v. Kitchen, 5 Esp. 46; 1 Greenl. Ev., § 310.

⁵ 2 Phil. Ev., § 373. A statute requiring service on a person always

means personal service where no other mode is expressly indicated. Rathburn v. Acker, 18 Barb. 375.

⁶ Larimore v. Bobb (Mo., 1893), 21 S. W. Rep. 922.

⁷ McLane v. Piaggio (Fla., 1888), 3 S. Rep. 823. See *ante*, § 150a.

⁸ Sapp v. King, 66 Tex. 570.

grieved. Under such circumstances the writ of subpoena is regarded as primary evidence of the service on the defendant and its existence cannot be proved by the admission of the defendant.¹ Parol evidence is admissible, however, to show his non-attendance.²

§ 280. Recognizance to secure presence of a witness.— In criminal proceedings, where the accused has been committed for trial or to await the action of the grand jury, or where the trial is continued, it is sometimes the practice to require the recognizance or personal bond of a witness in order that his attendance at the trial may be secured.³ Sureties may also be taken in the discretion of the court, and if they are not procurable, or if the witness refuses to give his recognizance, he may be kept in custody.⁴ The modern tendency is to regard such a mode of procedure as oppressive and unjust to an innocent person whose only offense is his accidental presence at a place where a crime is alleged to have been committed,⁵ and consequently it is sometimes provided by statute that a witness who is unable to give sureties for his appearance may be released from custody upon giving his deposition.⁶

§ 281. Obstructing attendance of witnesses.— At common law, and now very frequently by statute, any attempt to retard or prevent the attendance of witnesses,⁷ or the act of advising a witness not to answer,⁸ is a misdemeanor.⁹ It matters not

¹ Hasbrouck v. Baker, 10 Johns. 248.

² Cogswell v. Meech, 12 Wend. 147.

³ Gwyn v. State, 64 Miss. 324; Comfort v. Kittle, 81 Iowa, 179.

⁴ 2 Hale, P. C. 282; Roscoe, Crim. Ev., p. 87; Evans v. Rees, 12 Ad. & El. 55. See Laws U. S. 1846, ch. 98, § 7; Fawcett v. Linthecum, 7 Ohio Cir. Ct. R. 141; 1 Greenl. on Ev., § 813.

⁵ See State v. Grace, 18 Minn. 398.

⁶ People v. Lee, 49 Cal. 37. A witness imprisoned is entitled to his per diem while thus committed. Robinson v. Chambers, 94 Mich. 471.

⁷ 4 Bl. Com. 129; Cutler v. Wright, W. N. 1890, p. 28; State v. Carpenter, 20 Vt. 9; Martin v. State, 28 Ala. 71; United States v. Kee, 39 Fed. Rep. 603; Com. v. Feely, 2 Va. Cas. 1; State v. Ames, 64 Me. 386; Cameron v. Lightfoot, 2 W. Bl. 1193; Com. v. Reynolds, 14 Gray, 87; State v. Horner (Del., 1893), 26 Atl. Rep. 73.

⁸ State v. Gandy, 23 Neb. 436; Perrow v. State, 67 Miss. 365.

⁹ The fact that the witness was expected to testify, though he is not under recognizance to appear or has been subpoenaed, is enough. State v. Horner (Del., 1893), 26 Atl. Rep. 73.

that the attempt is unsuccessful,¹ or that the obstructor refrains from the employment of violence and confines himself wholly to threats or scurrilous language,² gets the witness drunk,³ or employs the machinery of the law to prevent the attendance of the witness by preferring an unfounded charge of crime against him, and, in collusion with a magistrate, procures his imprisonment.⁴ The witness himself may procure the arrest of the party who has thus maliciously hindered his attendance at court,⁵ or the person who is guilty of the offense of intimidating or obstructing the witness may be indicted by the grand jury.⁶ Intimidating a witness from testifying against a felon, though a misdemeanor, does not, it is held, constitute the offender an accessory to the felony;⁷ nor is a person punishable for intimidating or impeding a witness who beats him *after* he has given his testimony.⁸ The public prosecuting attorney should not be allowed to endeavor to dissuade the witnesses for the accused from appearing and testifying, even though he may believe they are unreliable and will perjure themselves.⁹

§ 281a. Changing venue for convenience of witnesses.— In order to save the expenditure of large sums as mileage or for the taking of depositions, it is very frequently provided by statute that, where the convenience of the witnesses requires it, the venue or place of trial of the action may be changed. Thus, where all the transactions occurred in the county to which it has been moved to change the venue,¹⁰ or where, though the transaction may have happened elsewhere,

¹ *Gandy v. State*, 23 Neb. 436; *State v. Carpenter*, 20 Vt. 9.

² *Rex v. Onslow*, 12 Cox, 356; *Charlton's Case*, 2 My. & Cr. 316; *Littler v. Thompson*, 2 Beav. 129.

³ *State v. Holt*, 84 Me. 509.

⁴ *United States v. Kindred*, 4 Hughes (U. S.), 493; *State v. Buck*, 62 N. H. 670 (witness arrested in civil case).

⁵ *Magnay v. Burt*, 5 Q. B. 394.

⁶ It is not necessary that the record of the case in which the witness was summoned (*State v. Carpenter*, 20 Vt. 9); or the fact of the material-

ity of the evidence of the witness (*Com. v. Reynolds*, 14 Gray, 87); or the particular method used to intimidate him (*State v. Ames*, 64 Me. 386), should be set forth in the indictment. See, also, *Perrow v. State*, 67 Miss. 365; *State v. Baller*, 26 W. Va. 90.

⁷ *Reg. v. Chapple*, 9 C. & P. 355.

⁸ *United States v. Thomas*, 47 Fed. Rep. 807. Cf. *United States v. Kee*, 39 Fed. Rep. 603.

⁹ *Gandy v. State*, 23 Neb. 436; 40 N. W. Rep. 302.

¹⁰ *Smith v. Mack*, 24 N. Y. S. 131.

all or a large majority of the material witnesses reside in that jurisdiction, the motion to change the venue should be granted.¹ But the rule is that no change of venue can be had in criminal trials for the convenience of witnesses,² and in civil cases, if the adverse party will sign a stipulation admitting what the witnesses will prove, the motion for a change of venue for their convenience may be refused.³

§ 282. Failure of witnesses to attend — Continuance, when granted.— The parties should employ and exhaust every available means to procure the attendance of their witnesses, and should be given every facility by the court for this purpose, together with any reasonable and necessary amount of delay. If, however, a party wholly neglects to summon a witness, or if, having subpoenaed him, counsel voluntarily goes to trial or fails to ask for a continuance in case the witness does not appear, the party cannot be heard to complain because the court orders the trial to proceed.⁴

The granting of a continuance because of the absence of a witness is largely, if not wholly,⁵ a matter of discretion for

¹ *Thompson v. Brandt* (Cal., 1893), 32 Pac. Rep. 890; *Ringgenburg v. Hartman*, 103 Ind. 537; *Nelson v. Nelson*, 66 Hun, 633; *Porter v. Lyle*, id. 629; *Cordás v. Morrison*, 23 N. Y. S. 1076; *Thurfjell v. Witherbee*, 24 id. 278; *Dunn v. Lewis*, 65 Hun, 620; *Thompson v. Norwood*, 64 id. 636; *Perry v. Boomhauer*, 17 N. Y. S. 890; 63 Hun, 629; *Daley v. Hellman*, 62 Hun, 620; *Kurz v. Fish*, 58 id. 602.

² *People v. Harris*, 4 Den. (N. Y.) 150.

³ *Wright v. Burritt*, 63 Hun, 628.

⁴ *Pease v. State* (Ga., 1893), 16 S. E. Rep. 113; *Carlo v. State* (Tex., 1893), 22 S. W. Rep. 147; *Crew v. State* (Tex., 1893), 22 S. W. Rep. 973; *Clay v. State* (Tex., 1893), 22 S. W. Rep. 973; *Dale v. State*, 88 Ga. 552; *Spahn v. People*, 117 Ill. 538; *Johnson v. State*, 85 Ga. 561; *State v. Underwood*, 44 La. Ann. 1114. A continuance is properly re-

fused where a party admits as evidence the statement of facts in his adversary's application for the continuance showing what the absent witness was expected to prove. *Sanford v. Gates*, 38 Kan. 405; *Woolsey v. Jones*, 84 Ala. 88; *Chicago, etc. Co. v. Duffin* (Ill., 1888), 18 N. E. Rep. 279. If the absence of the witness was anticipated, and particularly if prior to his departure his deposition could have been readily obtained, a continuance should be refused because of his absence. *Valle v. Picton*, 91 Mo. 207; 3 S. W. Rep. 860.

⁵ *Winklemeier v. Daber*, 52 N. W. Rep. 1036; 92 Mich. 631; *White v. Portland* (Conn., 1893), 26 Atl. Rep. 342; *Guy v. Metcalf*, 83 Tex. 37; *McQueen v. People's Nat. Bank*, 111 N. C. 509; *Richmond R. & E. Co. v. Dick*, 8 U. S. App. 99; 52 Fed. Rep. 379; *Valle v. Picton*, 91 Mo. 207; 3 S. W. Rep. 860; *McKinsey*

the court, and, unless the evidence of the witness is material, a refusal to allow a continuance is not ground for a new trial.¹ Not only must the materiality of the evidence of the absent witness be shown, but the party should also show that he has been served with a subpoena, or, if he cannot be found, that a diligent search has been made for him.² If the witness is confined to his house by illness or is absent from the jurisdiction, that fact must appear, and usually it must also be shown that his illness is so severe as to prevent his deposition from being obtained.³ The party must also show that no other witnesses are known to him by which he could prove what he expects to prove by the absent witness.⁴ So a continuance should be refused where the witness is a convict whose disabilities have never been removed,⁵ where it appears that his evidence would be irrelevant or otherwise inadmissible,⁶ or where he is a person having only a transient abode, without social or business ties in the jurisdiction, and the party knows nothing of his whereabouts or of the possibility of obtaining his future attendance.⁷ But where the materiality of the evidence is shown, the absence of the witness satisfactorily accounted for,

v. McKee, 109 Ind. 209. Plaintiff sued to recover the value of two horses. Defendant moving for a continuance because of the absence of a witness, plaintiff agreed to dismiss the suit as to the horse regarding which the witness was to testify. A continuance was properly refused. *Herd v. Herd*, 71 Iowa, 497.

¹ *Barbour v. Melendy*, 88 Va. 595; *Central R. Co. v. Curtis*, 87 Ga. 416; *Cox v. Hart*, 145 U. S. 376; *Alabama, etc. Co. v. Hill*, 93 Ala. 514; *Davis, etc. Co. v. Riverside Co.* (Wis., 1893), 54 N. W. Rep. 506; *Stone v. Railroad Co.* (S. D., 1893), 53 N. W. Rep. 189; *Hodges v. Nash*, 43 Ill. App. 638.

² *Clouston v. Gray*, 48 Kan. 31. An allegation of diligence in the search is not sufficient. The question of diligence is for the court, and the facts constituting it must be shown in detail by the affidavit of the party.

Struthers v. Fuller, 45 Kan. 735; *Doll v. Mundine*, 84 Tex. 315; *Kilmer v. St. Louis, Ft. S. & W. R. Co.*, 37 Kan. 84; 14 Pac. Rep. 465.

³ *Marmet v. Archibald*, 37 W. Va. 778; *Murphy v. State* (Tex., 1893), 21 S. W. Rep. 45; *Texas, etc. Co. v. Hall*, 83 Tex. 675; *St. Louis, etc. Co. v. Olive*, 40 Ill. App. 82; *German Ins. Co. v. Penrod*, 35 Neb. 273; *Doll v. Mundine*, 84 Tex. 315.

⁴ *Davis, etc. Co. v. Riverside Co.* (Wis., 1893), 54 N. W. Rep. 506; *Hodges v. Nash*, *supra*; *Toledo, etc. Co. v. Stevenson*, 131 Ind. 203; *Trevelyan, Adm'r, v. Lofft*, 83 Va. 141.

⁵ *Tillman v. Fletcher*, 78 Tex. 673.

⁶ *Longnecker v. Shields* (Colo., 1892), 28 Pac. Rep. 659.

⁷ *Carberry v. Warrell*, 68 Miss. 573; *Mantonya v. Hierter*, 35 Ill. App. 27; *Watson v. Blymer Manufg. Co.*, 2 S. W. Rep. 353; 66 Tex. 558.

and a proper guaranty given that his testimony will be forthcoming at the next term, a refusal to grant a continuance has been held to be reversible error.¹

§ 283. **Continuance in criminal trials.**—In criminal as in civil causes the power to grant a continuance because of the absence of a witness is, in the absence of statute prescribing when one must be granted, a matter of discretion.² As a rule the courts are disposed to exercise this discretion liberally in favor of life and liberty; and where the competency of the absent witness and the materiality and probable truth of his testimony are shown *prima facie* by affidavits by the accused, the courts have gone very far in sustaining his right to have a continuance granted.³ But if the evidence which the absent witness is expected to give is very remote or immaterial,⁴ or is merely cumulative in its character,⁵ the continuance should be refused. If from the evidence already received it appears that the absent witness has no knowledge of the matter in issue,⁶ or if the court has sufficient reason for believing that certain facts which the absent witness is expected to controvert are already so far sustained by a preponderance of the evidence that his testimony bearing thereon

¹ *Gonring v. Railroad Co.*, 78 Wis. 16; *Johnson v. Mills*, 31 Neb. 524; *Cook v. Larson*, 47 Kan. 70.

² *Brown v. State*, 1 Pickle (Tenn.), 439; *State v. Wise*, 33 S. C. 382; *Jackson v. State*, 54 Ark. 243; *Walker v. State*, 91 Ala. 76; *Woolfolk v. State*, 85 Ga. 69; *Thompson v. Com.*, 88 Va. 45; *Price v. People*, 131 Ill. 223; *Hardesty v. Com.*, 88 Ky. 587; *Walkup v. Com.* (Ky., 1893), 20 S. W. Rep. 221.

³ *Bowlin v. Com.* (Ky., 1893), 22 S. W. Rep. 543; *Givens v. State* (Tex., 1893), 21 S. W. Rep. 44; *Tankersley v. State*, 31 Tex. Cr. App. 595; *State v. Lund*, 49 Kan. 580; *Harrington v. State*, 31 Tex. Crim. Rep. 577; *Hyden v. State*, 31 Tex. Crim. Rep. 401; *Price v. People*, 131 Ill. 223; *Pyburn v. State*, 84 Ga. 193; *McAdam v. State*, 5 S. W. Rep. 826; 24

Tex. App. 86; *Sutton v. People*, 119 Ill. 250.

⁴ *Goldsmith v. State* (Tex., 1893), 22 S. W. Rep. 405; *Dow v. State*, 31 Tex. Cr. Rep. 278; *Knowles v. State*, 31 id. 383; *State v. Falconer*, 70 Iowa, 418; *State v. Spillman*, 43 La. Ann. 1001; *State v. Turlington*, 102 Mo. 642; *Hyburn v. State*, 26 Tex. App. 668; *Crumpton v. United States*, 138 U. S. 361.

⁵ *Attaway v. State*, 31 Tex. Cr. Rep. 475; *McKinney v. State*, 3 Wyo. 719; *Smith v. Com.* (Ky., 1892), 17 S. W. Rep. 68; *Gonzales v. State*, 30 Tex. App. 203; *Wilkerson v. Com.*, 88 Ky. 29.

⁶ *Griffin v. State* (Tex., 1893), 20 S. W. Rep. 552; *Jones v. State*, 31 Tex. Cr. Rep. 177; *Norris v. State* (Tex., 1893), 22 S. W. Rep. 592; *Childs v. State* (Tex., 1893), 22 S. W. Rep. 1039.

would probably be untrue,¹ it is not error for the court to refuse a continuance. Where by consent and to avoid a continuance a stipulation is entered into that an absent witness for the accused will testify as alleged, the reputation of the witness for veracity may be attacked by the state.²

§ 284. **Non-attendance of witnesses — When a contempt of court.**— A witness who has been properly summoned is guilty of a contempt of court if he intentionally fails or refuses to attend;³ and the court may, if his contempt is very manifest, grant an *ex parte* and immediate order for his arrest, though usually an attachment will issue only after the granting and return of a preliminary order to show cause.⁴ Nor is it essential that the trial should have begun or the witness have been called in open court before an attachment will issue to procure his presence if clear proof is offered that he is wilfully disobedient to the court in thus absenting himself.⁵ The party should move promptly for an attachment to bring the witness in person before the court, founding his application

¹ Brown v. State (Tex., 1893), 22 S. W. Rep. 596; Robbins v. State (Tex., 1893), 20 S. W. Rep. 358; Harvey v. State, 21 Tex. App. 178.

² Johnson v. Com. (Ky., 1894), 23 S. W. Rep. 507. The affidavit for a continuance must show specifically the facts to which the witness will testify, their connection with and relevancy to the subject-matter (Long v. People, 135 Ill. 535; State v. Manceaux, 42 La. Ann. 1164; Carthaus v. State, 78 Wis. 540; Holland v. State, 31 Tex. Cr. Rep. 345); that the witness has a knowledge of such facts (Long v. People, 34 Ill. App. 481; Bengé v. Com. (Ky., 1892), 17 S. W. Rep. 146); that the affiant believes the evidence of the witness is true (State v. Dusenberry, 112 Mo. 277; North v. People, 139 Ill. 81); that he also believes that his testimony can be procured in time, stating the grounds for such belief (State v. Harrison, 36 W. Va. 729; Skates v. State, 64 Miss. 644; Faulkner v.

Territory (N. M., 1893), 30 Pac. Rep. 905; State v. Alred (Mo., 1893), 22 S. W. Rep. 363); and that proper diligence has been employed to procure the attendance of the witness. Haverstick v. State (Ind., 1893), 32 N. E. Rep. 785; Vogt v. Com. (Ky., 1892), 17 S. W. Rep. 213. See *post*, §§ 355-358, as to the form and language of affidavits generally.

³ In re Gunn, 50 Kan. 155; People v. Brown, 46 Hun, 320.

⁴ The power to grant an attachment is discretionary (Dowden v. Junker, 48 N. J. Eq. 534; State v. Hillstock (La., 1893), 12 S. Rep. 352; Bradley v. Fertilizer Co. (N. C., 1893), 17 S. E. Rep. 69), though the matter is usually regulated by statute. People v. Barrett, 56 Hun, 351.

⁵ Wilson v. State, 57 Ind. 71; Bradley v. Fertilizer Co. (N. C., 1893), 17 S. E. Rep. 69 (examination of defendant before trial). Cf. Robsen v. State, 83 Ga. 166; 9 S. E. Rep. 610.

upon affidavits showing a prompt, seasonable and personal service of the subpoena and the payment or tender of the proper fees; for a writ of attachment for contempt is an extraordinary remedy, wholly in the discretion of the court, and it should only issue upon clear and convincing evidence that its issuance is needed,¹ and that the evidence of the witness is material,² though the immateriality of his evidence will be no defense for a witness who distinctly refuses to obey a subpoena.³ A witness who has received early notice to attend court will be in contempt if, believing he has sufficient time, he postpones compliance with the subpoena until the case is on trial.⁴ A magistrate who by the laws of the forum possesses the power to punish for contempt may, where he is requested by letters rogatory to take a deposition, commit a witness for contempt if the latter fails to obey his summons or if he refuses to be sworn or to answer any proper questions.⁵

§ 285. Privilege of witnesses from service of civil process.—A witness whose residence is beyond the jurisdiction of the court is privileged from the service of a summons or other civil process under the same conditions as to time and place, and for the same reasons, as he is exempt from civil arrest while voluntarily attending court.⁶ The defect in the service of a writ, caused by the privilege or exemption of the

¹ *Garden v. Creswell*, 2 M. & W. 319; *State v. Trounce*, 5 Wash. St. 804; *People v. Van Tassell*, 64 Hun, 444; *Wyatt v. People*, 17 Colo. 252.

² *Corbett v. Gibson*, 16 Blatchf. C. C. 334; *Dicas v. Lawson*, 1 Cr., M. & R. 934.

³ *Chapman v. Davis*, 3 M. & G. 609; *Scholes v. Hilton*, 10 M. & W. 16.

⁴ *Jackson v. Seager*, 2 D. & L. 13. Cf. *Reg. v. Sloman*, 1 Dowl. 618.

⁵ *Burnham v. Stevens*, 33 N. H. 247.

⁶ See § 286; *Hollander v. Hall*, 58 Hun, 604; *Christian v. Williams*, 35 Mo. App. 297; *First Nat. Bank v. Doty*, 12 Pa. Co. Ct. R. 287; *Thorp v. Adams*, 58 Hun, 603; *Mitchell v. Judge*, 53 Mich. 541; *Compton v.*

Wilder, 40 Ohio St. 130; *Sherman v. Gundlach*, 37 Minn. 118; *In re Healey*, 53 Vt. 694; *Bolgiano v. Lock Co.*, 73 Md. 132; *Finch v. Gallagher*, 25 Abb. N. C. 404; *Palmer v. Rowan*, 21 Neb. 452; *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153; *Massey v. Colville*, 45 N. J. L. 119; *Wilson v. Donaldson*, 117 Ind. 356; *Pope v. Negus*, 14 Civ. Pro. Rep. 406; *Marks v. Societie*, 22 id. 201; *Sheehan v. Bradford, etc. Co.*, 15 id. 429. This exemption is limited to the jurisdiction in which the witness testifies. So a resident of Vermont may be served with civil process in Massachusetts while passing through that state to testify in a Connecticut court. *Holyoke, etc. Co. v. Ambden*, 55 Fed. Rep. 593.

person served, not appearing on the record, the service cannot be set aside on motion merely. The privilege of a witness is a defense which must be pleaded in abatement, and the issue of fact, if any, arising thereon is for the jury.¹

§ 286. **Privilege of witnesses from civil arrest.**—Witnesses are protected from arrest under civil process during the time they are proceeding to, remaining at or returning from court,² or a place where a legislative or congressional investigation committee is in session.³ Non-resident witnesses, in order to encourage their voluntary attendance, and because they cannot be summoned by subpoena, will be privileged though they may come into the state voluntarily;⁴ but the rule is otherwise in the case of a witness residing in the jurisdiction attending voluntarily without a subpoena.⁵ The witness waives his privilege by voluntarily submitting to arrest or by failing to assert it and to claim his liberty at his earliest opportunity.⁶ He cannot then claim that his privilege has been violated.⁷ The court in which the witness is called to testify will, in the case of his illegal arrest, order his immediate discharge upon motion,⁸ though in the case of inferior courts the witness may be under the necessity of employing the writ of *habeas corpus*.⁹ The trial in which he was to testify will be continued until his discharge.¹⁰

¹ Greer v. Young, 120 Ill. 184.

² 1 Greenl. on Ev., § 316; Meekins v. Smith, 1 H. Bl. 636; Ballinger v. Elliott, 72 N. C. 596; Randall v. Gurney, 3 B. & A. 252; Huntington v. Schultz, Harp. (S. C.) 452; Hopkins v. Coburn, 1 Wend. (N. Y.) 292; May v. Shumway, 16 Gray, 86; Ex parte Temple, 2 Ves. & B. 391, 395; Sandford v. Chase, 3 Cow. (N. Y.) 381.

³ Thompson's Case, 122 Mass. 248.

⁴ Person v. Grier, 66 N. Y. 124; Norris v. Beach, 2 Johns. 294; May v. Shumway, 16 Gray, 86; Dixon v. Ely, 4 Edw. (N. Y.) 557; Ballinger v. Elliott, 72 N. C. 596; Jones v. Knaus, 31 N. J. Eq. 211.

⁵ Rogers v. Bullock, 2 Pen. (3 N. J.

L.) 517; Hardenbrook's Case, 8 Abb. Pr. (N. Y.) 416; McNeil's Case, *supra*.

⁶ Woods v. Davis, 34 N. H. 328; Smith v. Jones, 76 Me. 138; Hess v. Morgan, 3 Johns. (N. Y.) 84.

⁷ 1 Greenl. on Ev., § 317; Brown v. Getchell, 11 Mass. 11, 14; Stevenson v. Smith, 28 N. H. 12; Dow v. Smith, 7 Vt. 465.

⁸ Moore v. Green, 72 N. C. 394; Cooley's Const. Lim., p. 163.

⁹ Smith v. Jones, 76 Me. 138.

¹⁰ 1 Greenl. on Ev., § 318, citing Sanford v. Chase, 3 Cowen, 381; Bell v. State, 4 Gill, 301; Hunt's Case, 4 Dall. 387; Com. v. Daniel, 4 Pa. L. J. R. 49; United States v. Edme, 9 S. & R. (Pa.) 147; Crocker v. Duncan, 6 Blackf. (Ind.) 278.

§ 287. **Duration of the privilege from arrest.**—The witness is privileged not only on his journey to and from court, but during his detention in the place where the court is sitting, if the sole reason of his stay is his purpose to testify.¹ The rule allows a reasonable time for the journey but does not countenance loitering,² though a slight deviation to partake of food,³ to see one's friends⁴ or to obtain papers which are to be used as evidence at the trial,⁵ will not nullify the privilege from arrest. If the witness, after testifying, before returning home proceeds to transact business which is wholly unconnected with his functions as a witness, his privilege ceases.⁶ A witness in attendance is privileged while at his lodgings⁷ or during a temporary adjournment of the court,⁸ though his inability to start for his home after the trial is over because of his lack of means will not extend his privilege.⁹ An officer, unless he is informed thereof, is not bound to know that a person whom he arrests is privileged as a witness;¹⁰ and it seems that no action for false imprisonment can be maintained against an officer making or a person procuring the arrest under such circumstances.¹¹ An arrest made after the termination of the privilege is not illegal because it is based on process which had issued and on which the witness had been once illegally arrested while the privilege existed.¹²

¹ *Perse v. Perse*, 5 H. L. Cas. 671; 429; *Gibbs v. Phillipson*, 1 R. & My. 19; *Ex parte Hurst*, 1 Wash. C. C. 186.

² *Chaffee v. Jones*, 19 Pick. (Mass.) 260.

³ *Mahon v. Mahon*, 2 Irish Eq. 440.

⁴ *Pitt v. Coomes*, 5 B. & Ad. 1078; *Attorney-General v. Skinner's Co.*, 8 Sim. 377; *Ex parte Clark*, 2 Dea. & Ch. 99.

⁵ *Ricketts v. Gurney*, 7 Price, 699.

⁶ *Shults v. Andrews*, 54 How. Pr. (N. Y.) 380; *Heron v. Stokes*, 6 Ir. Eq. 125; *Pitt v. Coomes*, *supra*; *Selby v. Hills*, 8 Bing. 166; *Jones v. Rose*, 11 Jur. 379.

⁷ *Childerston v. Barrett*, 11 East,

1 R. & My. 19.

⁸ *Ex parte Temple*, 2 Ves. & B. 391; *Spencer v. Newton*, 6 Ad. & E. 623; *Hatch v. Blisset*, 2 Stra. 986.

⁹ *Spencer v. Newton*, 6 Ad. & E. 623.

¹⁰ *Cooley on Torts*, p. 193; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Sperry v. Willard*, 1 Wend. (N. Y.) 32; *Wood v. Kinsman*, 5 Vt. 588; *Brown v. Getchell*, 11 Mass. 11.

¹¹ *Smith v. Jones*, 76 Me. 138; *Sperry v. Willard*, *supra*; *Vandevelde v. Snellen*, 1 Keb. 220; *Chase v. Fish*, 16 Me. 132.

¹² *Humphrey v. Cumming*, 5 Wend. (N. Y.) 90; *Petrie v. Fitzgerald*, 1 Daly (N. Y.), 401.

§ 288. **Attendance of witnesses in custody.**—The attendance of a witness who is incarcerated in prison or who is in the military or naval service may be procured by the service of a writ of *habeas corpus ad testificandum* on the prison keeper or officer in whose immediate charge he is.¹ The application for the writ should specify the nature of the suit in which his attendance is needed, that the evidence of the witness is material, and that the witness is restrained from attending court, together with the circumstances of the restraint so far as they are known to the affiant.² As the general rules governing the granting and the service and return of this writ are those which obtain in connection with the ordinary writ of *habeas corpus*, no elaboration of them is necessary in this connection.³

§ 289. **Attendance of witnesses before legislative bodies.** As a rule the power to summon witnesses and to take testimony is considered to be inherent in legislative bodies for all purposes within the scope of the constitutional powers possessed by those bodies, and the refusal or neglect of a witness to appear or to answer proper questions is a contempt for which he may be arrested and imprisoned.⁴ The power of the federal congress to commit for contempt should be strictly confined within the constitutional functions of that body. Neither house is a court of justice, as was the English parliament originally, but either house may exert certain powers under the constitution; as, for example, it may decide contested elections and the qualifications of its members or may impeach certain public officials. If then congress exceeds these powers and summons a witness to testify to a matter which is exclusively for judicial investigation, it has no power to commit for contempt of its process if the witness refuse to answer questions.⁵

¹ *Ex parte Marmaduke*, 91 Mo. 228, 251.

² 1 Greenl. on Ev., § 312.

³ See *Church on Habeas Corpus*.

⁴ 1 Kent, 236, 237; 2 Story, Const., §§ 305-317; *In re Gunn*, 50 Kan. 125; *Burnham v. Morrissey*, 14 Gray, 226; *Anderson v. Dunn*, 6 Wheat. 204; *Yards' Case*, 10 Pa. Co. Ct. Rep. 41.

⁵ *Kilbourn v. Thompson*, 105 U. S. 168, 181-205. See, also, *In re Pac. R. R. Com.*, 32 Fed. Rep. 251-253; *Ex parte Dalton*, 44 Ohio St. 150. As to the power of a city council to commit a witness for contempt, see *Whitcomb's Case*, 120 Mass. 123.

CHAPTER XXII.

COMPETENCY OF WITNESSES.

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| <p>§ 300. Classes of persons incompetent.</p> <p>301. Parties as witnesses at common law.</p> <p>302. Testimony of party admissible when his connection with action no longer exists.</p> <p>303. What constitutes interest in the event.</p> <p>304. Exceptions to the common-law rule—The answer as evidence for the defendant in equity.</p> <p>305. Competency of parties as witnesses in equity — The employment and effect of a bill of discovery.</p> <p>306. Defendant in criminal trial — His competency as a witness.</p> <p>307. Statutory competency of parties as witnesses.</p> <p>308. Incompetency of interested persons to testify as to transactions with deceased or insane persons.</p> <p>309. What are transactions with decedents.</p> | <p>§ 310. Persons interested — Their statutory incompetency.</p> <p>311. Incompetency of parties to negotiable instruments to impeach them.</p> <p>312. Competency of counsel as witnesses.</p> <p>313. Competency of judges as witnesses.</p> <p>314. Competency of arbitrators as witnesses in an action on the award.</p> <p>315. Definition and form of oath and affirmation.</p> <p>316. Incompetency because of a lack of religious belief.</p> <p>317. Incompetency of insane persons as witnesses.</p> <p>318. Deaf mutes as witnesses.</p> <p>319. Children as witnesses.</p> <p>320. Witnesses rendered incompetent by conviction of infamous crimes — The effect of pardon.</p> <p>321. Statutory regulation of the competency of witnesses convicted of crime.</p> <p>322. Statutes construed.</p> <p>323. Accomplices.</p> <p>324. Corroboration of accomplices.</p> |
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§ 300. Classification of persons incompetent as witnesses. The common law, proceeding upon the theory that the prevention of perjury was of paramount importance to the possible ascertainment of truth, rejected absolutely certain classes of persons as witnesses. Thus, the parties to the suit and all other persons who had any pecuniary interest in the litigation; such persons as from a deficiency or peculiarity of re-

ligious belief were presumed to be regardless of the sanctity of an oath, and persons of imperfect mental powers, as lunatics, children and idiots, were incompetent as witnesses. It is clear that by rejecting the testimony of the parties and of persons interested in the event of the suit two most valuable sources of information were lost. Those who have a direct and actual pecuniary interest in a transaction, or who are connected by ties of relationship or interest with the parties to it, are most likely to be best informed, not only as to the main transaction, but as to its most trivial details. It was considered, however, that a grave danger existed that interested persons would perjure themselves if allowed to testify as witnesses, and to obviate the danger of such corrupting influences altogether they were absolutely excluded from the witness stand. That interested persons when summoned as witnesses would always commit perjury was not the basis of their rejection. But the very great probability and even certainty that some would or might do so were considered sufficient to incapacitate them as a class from testifying.

The arbitrary character of this common-law rule rendering the parties and persons interested incompetent as witnesses was recognized even by those authorities and cases in which it was formulated. It was clearly seen that interest, like bias, is only valid as an objection to a witness when it is urged in connection with the credibility of his testimony, and it was admitted that it was absurd to permit a witness to testify, no matter how friendly or hostile he might be towards the party who called him, while, at the same time, excluding the testimony of other witnesses equally well and perhaps better informed because it happened that they had a slight pecuniary interest in the result of the suit. The early writers do not attempt to justify the rule on logical grounds, but, with the conservatism of the common law, they merely point out that the rule being firmly settled from early times ought, in order to obtain stability and certainty in the law, to be very strictly adhered to, and that to abrogate it would certainly open the door to a vast amount of perjury on the part of the majority of interested witnesses. In the quaint language of Baron Gilbert,¹ the rule was designed "to preserve infirmity from a

¹ 1 Gilb. Ev., §§ 220, 224.

snare and integrity from suspicion." Modern statutory legislation, while fully recognizing the element of interest as it affects the credibility of testimony, has swept away this arbitrary exclusion of parties and interested persons as witnesses. While it is possible that perjury in court has been sensibly increased by these enactments, it is very clear, on the other hand, that the avenues and means for the ascertainment of truth in judicial proceedings have been wonderfully widened and augmented thereby.

§ 301. Parties incompetent as witnesses at common law. Though the common-law rule that a party to the record is not competent as a witness in his own behalf has been abolished in this country, it may be useful to consider some of the cases in which it was employed at common law, as the element of interest is still an objection to the competency of a witness in certain cases where he is called upon to testify against the representatives of a deceased person. Neither a real nor a nominal party to an action could at common law be compelled by his adversary to testify against himself,¹ so that where a party desired to interrogate his opponent he had to resort to the expensive and cumbrous equitable proceeding of a bill of discovery.² As the admissions of a party have always been admissible against him, he might, at common law, consent to testify voluntarily for his adversary, though it seems that where several persons were joined as plaintiffs none of them could, where the interest of all was joint and not several merely, testify in behalf of the defendant, unless with the consent of those who were associated as plaintiffs with him.³

In respect to the competency of members of a private corporation as witnesses in suits to which the latter is a party, a distinction was made at common law between business or trading corporations and those incorporated solely for religious or charitable purposes. In the case of business corporations the vested pecuniary interest of the member or stockholder was considered sufficient to render him incompetent to

¹ *Rex v. Woburn*, 10 East, 395.

² See *post*, § 305.

³ *Scott v. Lloyd*, 12 Pet. 149; 1 *Greenl. on Ev.*, §§ 353, 354. So a mere nominal party could not consent to testify for his opponent without the consent of the real party. *Frear v. Evertson*, 20 Johns. 142.

testify for or against the corporation.¹ The members of charitable corporations, on the other hand, were competent witnesses in any action in which the latter was a party.²

At common law an inhabitant of a public municipal or *quasi*-municipal corporation was incompetent (because of interest) as a witness in any action to which the corporation was a party.³ But the interest which the residents of a municipal or public corporation have as such in the determination of the action is so extremely small and contingent, and the necessity for their testimony to prevent a miscarriage of justice is so urgent, that this rule was often relaxed. It is now abrogated expressly or by implication both in England and in the United States. So, generally, the shareholders in a private corporation are now competent as witnesses for or against the corporation.

§ 302. Testimony of party admissible when his connection with action no longer exists.—At common law one of several defendants or plaintiffs jointly sued became a competent witness for the others immediately upon the severance of his connection with them as litigants. In civil proceedings a distinction was made at common law between actions *ex contractu* and those which are *ex delicto*, so far as the competency of a party as a witness is concerned, where his connection with the litigation no longer existed. In an action on a joint contract a defendant against whom judgment had been taken by default was not allowed to testify on the trial, for the reason that the value of such a judgment would of course depend upon the ultimate decision of the action for or against his joint obligors.⁴ But this rule is not universal. There are many decisions which sustain the proposition that at common law a party whom it is alleged is interested jointly with others in the subject-matter of the contract which is sued on could testify as a witness for or against his alleged associates imme-

¹ City Council v. King, 4 McCord, 487; Foundry v. Hovey, 21 Pick. 453. Bloodgood v. James, 12 Johns. 285, and cases cited in 1 Greenl. on Ev., § 331.

² 1 Greenl. on Ev., § 333 and cases cited.

³ Odiorne v. Wade, 8 Pick. 518; Rex v. London, 2 Lev. 231. Cf.

⁴ Thornton v. Blaisdell, 37 Me. 190; Mills v. Lee, 4 Hill, 549; Schermerhorn v. Schermerhorn, 1 Wend. 119; 1 Greenl. on Ev., § 355.

diately upon his ceasing by his default to be a party to the record,¹ or by a *nolle prosequi* entered as to him upon his plea of infancy, mental incapacity to contract, release or other matter which will result in his discharge from liability.²

A joint defendant in an action of tort becomes at common law a competent witness for either party where a judgment is taken against him by default, upon the ground that, though jointly sued, there can be no contribution among wrong-doers, and that his liability being ascertained he is no longer an interested party.³

§ 303. What constitutes an interest in the event.—By the rules of the common law persons interested in the event of the action were, with the parties themselves, incompetent as witnesses to testify therein, their incompetency being based upon the extreme probability which was supposed to exist that they would testify falsely.⁴ The incompetency of interested persons has been almost universally abolished by statute, except that in certain cases all persons interested in the event of the action are forbidden to testify to any transaction they may have had with the other party to the action where such party is deceased or insane.⁵ The interest which will disqualify a witness at common law must be a legal, substantial, present, vested and *ex parte* interest. Its amount is not material. Because of the difficulty of ascertaining how much the witness would be influenced by his interest, the law recognizes no gradations but excludes the evidence of all interested persons, however small their interest may be. The mere belief or expectation of the witness that he may gain or lose by the result of the trial, or that he is morally bound to reimburse the losing party, or his inclination from friendship or relationship towards the party, will not render him incompetent.⁶ So the witness will be disqualified only where he

¹ *Berry v. Stevens*, 71 Me. 503; *Manchester v. Moore*, 19 N. H. 564.

² *Blake v. Ladd*, 10 N. H. 190; *Minor v. Bank*, 1 Pet. 74; 1 Greenl. on Ev., §§ 355-357.

³ 1 Greenl. on Ev., § 357, citing *Ward v. Hayden*, 2 Esp. 552; *Hadrick v. Heslop*, 12 Jur. 600. In so far as the testimony of a defendant

who has suffered judgment by default may influence the amount of damages recoverable, it would seem to be incompetent at common law. *Thorpe v. Barber*, 5 M., G. & S. 675.

⁴ See *ante*, § 300.

⁵ See §§ 308-310.

⁶ 1 Greenl. on Ev., § 386.

is interested in the event or result of the particular action. That the rule of law which is decided in the case in which he testifies will render him liable in another action or under like circumstances does not make him interested in the event unless the judgment in the earlier action will be evidence for or against him in the later.¹

At common law a person is interested in the event where he is legally bound to indemnify a party against the consequences of a fact which is essential to the judgment. So, generally, where the title to real or personal property is in issue, or where the quality or wholesomeness of articles of food or other merchandise is involved, the vendor or other person who stands in the position of a guarantor to one of the parties is interested in the event of the suit.²

§ 304. Exceptions to the common-law rule — The answer as evidence for the defendant in equity.—The common-law rule by which a party was incompetent as a witness in his own behalf was subject to some exceptions even prior to its modification by statutory enactment. So where independent proof is given that the adverse party wrongfully intermeddled with or converted or negligently lost property committed to him as bailee, the owner was permitted to testify to its condition and value, for from the necessity of the case these facts are usually known to him alone.³ So because of paramount necessity a party was allowed to testify to the loss of a missing writing as a foundation for offering secondary evidence of its contents, or he was permitted to take a supplementary oath to the correctness of his entries in his books of account in cases where, from the nature of things, neither party could claim any knowledge but that which was contained in the books. When, however, a party was permitted at common law to testify to the loss of and the search for a deed, independent evidence was always required

¹ 1 Greenl. on Ev., § 389, citing *Stewart v. Kip*, 5 Johns. 256; *Bent v. Baker*, 3 T. R. 27; *Hoyt v. Wild-fire*, 3 Johns. 518; *Evans v. Eaton*, 7 Wheat. 356; *Evans v. Hettich*, 7 id. 453; *Owings v. Speed*, 5 id. 423; *Jackson v. Nelson*, 6 Cow. 248.

Steers v. Carwardine, 8 C. & P. 570; *Biss v. Mountain*, 1 M. & Rob. 302; *Baxter v. Graham*, 5 Watts, 418; *Heermance v. Vernoy*, 6 Johns. 5; *Hale v. Smith*, 6 Greenl. (Me.) 416.

³ *Childrens v. Saxby*, 1 Vern. 207; 1 Greenl. on Ev., §§ 348-350; *Snow v. Railroad Co.*, 12 Met. 44.

² 1 Greenl. on Ev., § 397, citing

to show that the deed had at one time existed.¹ So at common law the testimony of a party was competent to prove all preliminary allegations not directly involved in the main issue; as, for example, that a witness was deceased, or could not be produced after a diligent search had been made.²

The sworn answer of the respondent to a bill in equity constituted another exception to the incompetency of a party as a witness. Where his opponent had by such means procured evidence for his own use, and by implication thus admitted the veracity of the adverse party, it was considered only just that the party who was thus compelled to furnish evidence against himself should receive the benefit of anything which he may have said in his own behalf.³ But, on the other hand, the admissions of the defendant contained in his answer are conclusive upon him.⁴ It should be noted, however, that the replies to the interrogatories which are contained in the answer do not constitute evidence for the defendant where the answer is verified only on information and belief.⁵ As the denials or replies of the respondent constitute evidence for him in equity, it follows that for the plaintiff to overcome their force the averments in the bill which are denied or not expressly admitted⁶ must be substantiated by the testimony of two witnesses, or by that of one witness corroborated by circumstances.⁷

¹ *Patterson v. Winn*, 5 Pet. 240; *Perry*, 10 Yerg. (Tenn.) 600; *Poignard v. Smith*, 8 Pick. 278; *Hardy v. Summers*, 10 Gill & J. (Md.) 316. See § 14.

² *Forbes v. Wale*, 1 W. Bl. 532; *Cook v. Remington*, 6 Mod. 237.

³ 2 Story, § 1528; *Patterson v. Scott* (Ill., 1893), 31 N. E. Rep. 433; *Nulton's Appeal*, 103 Pa. St. 286; *Johnson v. Crippen*, 62 Miss. 597; *Rick v. Neitzky*, 1 Mackey (D. C.), 21; *Bird v. Styles*, 18 N. J. Eq. 297; *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Slessinger v. Buckingham*, 17 Fed. Rep. 454; *Hartley v. Mathews* (Ala., 1893), 11 S. Rep. 452; *Lee v. Baldwin*, 10 Ga. 208; *Lyerly v. Wheeler*, 3 Ired. (N. C.) Eq. 599; *Miles v. Miles*, 32 N. H. 147; *Jones*

⁴ *Langdell, Eq. Pl.*, § 84; *Home Ins. Co. v. Myers*, 93 Ill. 271; *Miller v. Payne*, 4 Bradw. (Ill.) 112.

⁵ *Allen v. O'Donnell*, 28 Fed. Rep. 17; *Berry v. Sawyer*, 19 id. 286.

⁶ *Cushman v. Bonfield*, 36 Ill. App. 436; *Peeler v. Lathrop*, 48 Fed. Rep. 780.

⁷ "Unless the complainant have two witnesses, or one witness and corroborating circumstances, he will not be entitled to relief. The reason is, by calling upon the respondent to answer, the complainant admits that the answer will be evidence

This rule requiring the plaintiff to overcome the answer of the defendant in equity by a preponderance of witnesses is not invoked where the answer is not sworn to by the respondent, even though a verification has been waived by the plaintiff,¹ or when, because of the fact that the defendant is a corporation, no sworn answer can be procured,² or in the case of any replies or denials in the answer which are not responsive to the interrogatories or to the allegations of the bill,³ or where the defendant on being permitted to testify orally contradicts the statements in his sworn answer,⁴ or where the denial is simply a denial of a conclusion of law.⁵

§ 305. Competency of the parties as witnesses in equity — The employment and effect of a bill of discovery.— Prior to the enactment of the statutes regulating the competency of parties as witnesses their testimony was receivable in equity with a great deal more liberality than in the courts of common law. The chancellor could, even if discovery was not required, in the exercise of his discretion issue an order for the examination of the defendant upon the application of the plaintiff and upon proof by affidavit that his evidence was material.⁶ The usual course, however, was for the plaintiff, where he wished to procure the evidence of one or more of the defendants, to include in his bill a prayer that the defendants should be required to make discovery, *i. e.*, a disclosure upon

equal to the testimony of any other witness, so that he cannot prevail unless the balance of proof is in his favor. To turn the scales he must at least have circumstances which corroborate such single adverse witness." The court, in *Tobey v. Leonard*, 2 Wall. 403. See, also, *United States v. Ferguson*, 54 Fed. Rep. 28; *Meyer v. Gullinan*, 105 Ill. 272; *Brook v. Silver*, 5 Del. Ch. 7.

¹ *Throckmorton v. Throckmorton*, 15 S. E. Rep. 289; *Pecke v. Hunter*, 86 Va. 768; *Bartlett v. Gale*, 4 Paige (N. Y.), 503; *United States v. Workingman's Council*, 54 Fed. Rep. 994.

² *Langdell*, Eq. Pl., § 78; *McLard*

v. Linville, 10 Humph. 163; *Bank v. Gerry*, 5 Pet. 99-112.

³ *Patterson v. Gaines*, 6 How. 550; *Rudy v. Austin*, 56 Ark. 73; *Atwood v. Harrison*, 5 J. J. Marsh. (Ky.) 329; *Lane v. Marshall*, 65 Vt. 85; *Sears v. Mason's Adm'r* (Va., 1890), 10 S. E. Rep. 529; *Cloud v. Calhoun*, 10 Rich. (S. C.) Eq. 358; *Green v. Vardiman*, 2 Blackf. (Ind.) 324; *Cartlege v. Cutliff*, 29 Ga. 758; *Fisher v. Porch*, 10 N. J. Eq. 243; *Ingersoll v. Stiger*, 46 id. 511; *Coleman v. Ross*, 46 Pa. St. 180.

⁴ *Morris v. White*, 36 N. J. Eq. 324.

⁵ *Gaines v. Russ*, 20 Fla. 157; *Deimel v. Brown*, 136 Ill. 586.

⁶ *Ashton v. Parker*, 14 Sim. 632.

oath of the truth of the facts in the case so far as they knew them. This prayer is usually inserted in every bill which is properly framed, the specific term "bills of discovery" being reserved for those bills the sole object of which is to obtain evidence by discovery which is to be employed in a proceeding in a court of law.¹ Interrogatories supporting and relating to the principal and material allegations of the bill are usually appended to it, and these, if they are consistent with the averments in the bill, should be specifically and responsively answered by the defendant.² The defendant, in case he is desirous of avoiding discovery, must plead or demur to the bill. If he elects to make discovery he should answer with particularity and preciseness,³ for, if he demur or plead, the truth of all averments in the bill which are not expressly traversed are taken as true *pro confesso* and the averments are then admissible as evidence for the plaintiff.⁴ The defendant is not compellable to give discovery in any case where, if he were a witness, he might claim to be privileged from answering the question put to him; as, for example, where his answer would tend to render him liable to a criminal prosecution or to punishment for crime,⁵ or where the information which is sought had been communicated to the defendant while he was acting in a confidential capacity, as attorney, physician or priest.⁶

As an unsworn answer cannot be considered as evidence for the defendant, and as the plaintiff is not required to overcome

¹ 2 Story's Eq., § 1489.

² Mechanics' Bank v. Lynn, 1 Pet. (U. S.) 376; Miller v. Saunders, 17 Ga. 92; Mechanics' Bank v. Levy, 3 Paige (N. Y.), 606; Read v. Woodruffe, 24 Beav. 421; Parkinson v. Trousdale, 3 Scam. (Ill.) 367; War-
ing v. Suydam, 4 Edw. (N. Y.) 362; Shotwell v. Struble, 21 N. J. Eq. 31; Brooks v. Byam, 1 Story, 296; Wooten v. Burch, 2 Md. Ch. 190; M. E. Church v. Jaques, 1 Johns. (N. Y.) Ch. 65, cited in 1 Pom. Eq. Jur., § 204.

³ Walker v. Walker, 3 Ga. 302.

⁴ Langdell's Eq. Pl., § 93; Story's

Eq. Pl., § 846; Hill v. Cravy, 7 Ark. 536; Jones v. Wing, Harr. Ch. (Mich.) 301.

⁵ Langdell's Eq. Pl., § 69; 1 Dan. Ch. Pl. & Pr., pp. 562, 567; Butler v. Catling, 1 Root (Conn.), 310; Wolf v. Wolf, 2 Har. & G. (Md.) 382; Livingston v. Tompkins, 4 Johns. (N. Y.) Ch. 415; Leigh v. Everheart, 4 T. B. Mon. (Ky.) 379; Northwestern Bank v. Nelson, 1 Gratt. (Va.) 108; Dwinal v. Smith, 25 Me. 379.

⁶ 1 Dan. Ch. Pl. & Pr., pp. 573, 574; 1 Pom. Eq. Jur., § 203; Story's Eq. Pl., § 846.

its force as such by the production of two witnesses or of one witness and corroborative circumstances, it follows that such an answer cannot be excepted to upon the ground of the insufficiency of the discovery contained in it.¹ Where, however, the defendant undertakes to make discovery on oath, he will be required to make full discovery, and, in case he shall refuse to do so, he may be coerced into making further and full discovery by the chancellor.²

§ 306. Defendant in criminal trial—His competency as a witness.—At common law the defendant in a criminal prosecution was incompetent as a witness in his own behalf because of his interest in the result, nor could he be compelled to testify against a person jointly indicted with him until he was discharged from custody or convicted. But where one of several jointly indicted pleaded guilty and received his punishment, he was held competent as a witness in behalf of his fellows who denied their guilt.³ By statute in nearly all the states of the Union and in the federal courts as well, the accused may now, in all cases, testify as a witness in his own behalf.⁴ The statutory changes through which the incompetency of the defendant in a criminal prosecution to testify in his own behalf has been removed have rendered a defendant a competent witness in behalf of those indicted with him. But generally accomplices are competent witnesses for each other, though concerned in the same crime, only when sepa-

¹ 1 Dan. Ch. Pl. & Pr. 760, n. 2; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599; *Bulkley v. Van Wyck*, 5 Paige (N. Y.), 536; *United States v. McLaughlin*, 24 Fed. Rep. 823.

² *Satterwhite v. Davenport*, 10 Rich. (S. C.) Eq. 305.

³ *Rex v. Fletcher*, 1 Stra. 633.

⁴ The statutes of all the states are substantially the same in principle. That of Illinois may be given as an example. "No person shall be disqualified as a witness in any criminal trial or proceeding by reason of his interest in the event of the same

as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." Illinois Crim. Code, § 426. The statutes are given in Abb. Crim. Brief, § 387.

rately indicted.¹ Hence where several are *jointly indicted and jointly tried*, whether the defendant testifies in behalf of another defendant, or when he volunteers as a witness for the state against his associates, *i. e.*, turns state's evidence, it is necessary that the proceedings should have come to an end so far as he is concerned either by his condemnation or acquittal.²

The fact that the trial of a defendant had been postponed, or that he was to have a separate trial, was formerly deemed insufficient to render him competent as a witness for or against others jointly indicted with him.³ This rule, however, is in modern practice and by statute somewhat relaxed, and a defendant who is indicted jointly with another person but who has been granted a separate trial may testify against but not for the other defendant prior to the final disposition of the charge against himself.⁴ On the other hand, if the state has closed its case without producing evidence of the guilt of any defendant which is sufficient to go to the jury, it is the duty of the court to direct a verdict of acquittal as to him, and he is then competent as a witness for the other party.⁵

§ 307. Statutory competency of parties as witnesses.—A party to the record is now generally, if not universally, both competent as a witness in his own behalf and compellable to testify for the adverse party.⁶ This important change has been brought about by statutory enactment in the different states, but as a general or detailed account of the numerous

¹ *United States v. Hunter*, 1 Cranch, 446; *McKenzie v. State*, 24 Ark. 636; *Tenn.* 923; *State v. Steifel*, 106 Mo. 129; *Sparks v. Com.*, 89 Ky. 644;

² *South v. State*, 86 Ala. 617; *State v. Minor* (Mo., 1893), 22 S. W. Rep. 1085; *Ballard v. State* (Fla., 1893), 12 S. Rep. 865; *Com. v. Marsh*, 10 Pick. 57; *People v. Bell*, 10 Johns. 95; *McGinnis v. State* (Wyo., 1893), 31 Pac. Rep. 978; *State v. Jackson*, 106 Mo. 174; *State v. Miller*, 100 Mo. 606. See *post*, § 330, for accomplices. *Allen v. State*, 10 Ohio St. 297; *State v. Thaden*, 43 Minn. 325; *Carroll v. State*, 5 Neb. 31. Cf. *State v. Mathews*, 98 Mo. 125; *Barnes v. State* (Tex., 1889), 11 S. W. Rep. 679; *Day v. State*, 27 Tex. App. 143. See *post*, §§ 323, 324.

³ *Greenl. on Ev.*, § 363. ⁵ *Cochran v. Ammon*, 16 Ill. 316; *Beasley v. Bradley*, 2 Swan (Tenn.), 180. And see cases cited in last two notes.

⁴ *McGinnis v. State* (Wyo., 1893), 31 Pac. Rep. 978; *State v. Barrows*, 76 Me. 401; *Benson v. United States*, 146 U. S. 245; *Richards v. State*, 91 *v. State*, 27 Neb. 272.

and variant statutes on this subject is impossible in a work of this scope, the reader is referred to the local statute of his own state and to the cases which are cited in the notes.¹ Generally by these statutes the jury are empowered to take into consideration the interest of the witness in the suit as an element bearing upon the credibility of his evidence,² though no inference should be drawn by them from the fact that the party does not exercise his statutory right to testify in his own behalf.³

The competency of witnesses in the federal courts is also regulated by a statute which provides in substance that the laws of the state within the limits of which the federal court is located shall be its rules of decision as to competency "in trials at common law, in equity and admiralty." The competency of witnesses *in criminal trials* in federal courts is not, therefore, regulated by the statutes of the state in which they are located, but by the common law of the state when it was admitted into the Union, modified of course by the federal statutes regulating criminal proceedings and the competency of witnesses therein.⁴

§ 308. Statutory incompetency of parties to testify as to transactions with deceased or insane persons.—Sometimes parties and interested witnesses are made competent by statute without any exception. In some of the states of the

¹The statutes mentioned in the text are as follows: Maine, R. S. 1881, p. 707, § 993; Massachusetts, Pub. St. 1882, p. 987, § 18; Rhode Island, Pub. St. 1882, p. 587, § 33; New York, Code C. P., 828; Pennsylvania, Bright. Dig., p. 727, § 20; Maryland, Pub. Laws 1888, p. 685, §§ 1-4; West Virginia, Code, p. 806, § 23; South Carolina, Code, § 400; Alabama, Code 1886, § 2765; Tennessee, Code 1884, § 4563; Ohio, R. S. 1890, § 5240; Iowa, Const. 1857, art. 1, § 4; Indiana, R. S. 1881, § 496; Michigan, How. Ann. St. 1882, p. 7544; Minnesota, Gen. Stat. 1878, p. 792, § 9; Montana, Comp. St. 1887, § 647; Arizona, 1887, § 1831; New Hampshire, Gen. Laws, 1878, p. 531; Con-

necticut, Gen. St. 1888, § 1094; Virginia, Code 1887, § 3345; North Carolina, Code 1883, § 589; Florida, Dig. 1881, p. 518; Georgia, Code 1882, § 854; Mississippi, Code 1880, § 1599; Kentucky, Code 1888, § 605; Illinois, R. S., p. 681, § 2; Kansas, Gen. Stat. 1889, § 4414; Nebraska, Comp. St. 1889, § 899; Nevada, Comp. St. 1885, § 3399.

²*Meeteer v. Man. R. R. Co.*, 63 Hun. 533; *Douglass v. Fullerton*, 7 Ill. App. 102; *State v. Rush*, 95 Mo. 199; *Harrington v. Hamburg* (Iowa, 1892), 52 N. W. Rep. 201.

³*Moore v. Wright*, 90 Ill. 470. See *post*, § 346a.

⁴*Logan v. United States*, 144 U. S. 263; 12 S. Ct. 617.

Union, however, it has been enacted that no party or person interested in the event shall be a competent witness against an executor, administrator or the committee of a lunatic or inebriate, while elsewhere such an interested witness is incompetent only so far as he is called to testify to a personal transaction with the deceased person or lunatic,¹ or "as to a matter of fact occurring before the death of the deceased person,"² or to "matters equally within the knowledge" of deceased.³ The present policy of the law is to admit freely interested persons as witnesses. Nevertheless it is deemed expedient, where the mouth of one party to a transaction is closed by death, that the other should also be silenced. The aim and end of these statutes are to put both parties upon an equality.⁴ But the provisions of these statutes may be waived expressly or by implication by the representative of the deceased person. So it is often provided by statute that if the representative voluntarily produces testimony to a conversation or transaction which was had with the deceased, either by going on the stand himself,⁵ or by producing the testimony of the deceased taken by deposition,⁶ or at a former trial,⁷ the other party or any interested person is thereby rendered competent.⁸ These

¹ Illinois R. S. 1880, ch. 51; Colorado Gen. Laws, §§ 3644, 3647; New York Code Civ. Pro., § 829.

² Code Cal., § 1880.

³ How. St. Mich., § 7545.

⁴ Abbott's Trial Evidence, p. 61, citing cases.

⁵ Cousins v. Jackson, 52 Ala. 265; Mitchell v. Cochran, 10 N. Y. S. 545; Hard v. Ashley, 117 N. Y. 606; 23 N. E. Rep. 606; Wilcox v. Corwin, 23 N. E. Rep. 500; 117 N. Y. 500; Jackson v. Jones, 74 Tex. 104; Wilcox v. Corwin, 50 Hun, 425; Nay v. Curley, 113 N. Y. 575. Where a surviving partner in an action brought against him on a firm note voluntarily testified to that transaction, the plaintiff was permitted to testify in his own behalf to facts and circumstances in rebuttal. Wiley v. Morse, 30 Mo. App. 266. In Foster

v. Hart, 29 Ill. App. 260, the statute was applied in an action against a firm, one partner of which was a survivor of the old firm with which the transaction was had.

⁶ Allen v. Chouteau, 103 Mo. 309; Nixon v. McKinney, 105 N. C. 23; Munroe v. Napier, 52 Ga. 388; Dunlop v. Dunlop, 94 Mich. 11.

⁷ Taylor v. Bunker (Mich., 1888), 36 N. W. Rep. 166; Stone v. Hunt (Mo., 1893), 21 S. W. Rep. 454. Cf. Walker v. Taylor, 43 Vt. 612; Hayden v. Grillo, 42 Mo. App. 1.

⁸ Munn v. Owens, 2 Dill. 477; Com. Ice Co. v. Kiefer, 26 Ill. App. 466; Martin v. Martin, 118 Ind. 227; Haskell v. Henry, 74 Me. 197; Potts v. Mayer, 86 N. Y. 302; Williamson v. State, 59 Miss. 235; McCarlin v. Traphagen, 45 N. J. Eq. 265; Parris v. McNeal (Neb., 1893), 55 N. W.

statutes, it is held, do not prevent the representative from calling a party or an interested witness to testify for the estate,¹ though this fact alone, that such a witness testifies for the representative,² or testifying in behalf of the opposite party is cross-examined³ by the representative, does not, where the prohibition against testifying is absolute, waive the right of the latter to have his testimony stricken out.

In a New York case⁴ it has been held that the statute excluding evidence of a personal transaction was not meant to abrogate the common-law rule or principle of evidence that where one party calls a witness, and, in examining him, brings out a particular part of a communication or transaction, the other party may bring out the whole communication or transaction so far as it has any bearing upon, or so far as it qualifies or explains, that specific part to which the examination was directed. So, in accordance with this principle, it has been held that where a representative of a deceased party examines the surviving party as to a personal transaction or conversation with the testator or intestate, the party thus examined is thereby enabled to testify, as a witness in his own behalf, to the whole transaction concerning which he has been examined,⁵ but not to other transactions or conversations.⁶ This result follows only where the executor testifies directly to the transaction, but not where he testifies to facts from which the existence or non-existence of the personal transaction or of some incident thereof may be inferred.⁷ In such a case it has

Rep. 222. Thus writings signed by the deceased have been admitted to rebut evidence of his verbal declarations given by the representative. *Smith v. Christopher*, 16 Abb. Pr. (N. S.) 332. See further in support of the text, *Kenyon v. Pierce*, 17 R. I. 794; *Sherer v. Ingerman*, 110 Ind. 442; *Trahern v. Colburn*, 63 Md. 104; *Rice v. Daly*, 66 Hun, 628; *Haines v. Watts* (N. J., 1893), 26 Atl. Rep. 572. *Contra*, *Louman v. Aubrey*, 72 Ill. 619; *Blood v. Fairbanks*, 50 Cal. 420.

¹ *Chase v. Evoy*, 51 Cal. 618.

² *Herrington v. Winn*, 14 N. Y. S.

612; *Canady v. Johnson*, 40 Iowa, 587; *Hopkins v. Bowers*, 108 N. C. 298.

³ *Achilles v. Achilles* (Ill., 1891), 28 N. E. Rep. 45. If the direct examination is excluded the cross-examination goes with it.

⁴ *Nay v. Curley*, 113 N. Y. 575.

⁵ *Nay v. Curley*, 113 N. Y. 578; *Michigan Sav. Bank v. Butler* (Mich., 1894), 57 N. W. Rep. 253.

⁶ *Copeland v. Koontz*, 125 Ind. 126; *Butz v. Schwartz*, 32 Ill. App. 156.

⁷ *Bowers v. State*, 19 N. Y. State Rep. 926.

been held that, where the adverse party may testify directly to the transaction itself which is gone into by the direct evidence of the executor, he cannot testify to any fact which would contradict inferences created by his evidence.¹ The executor must have testified voluntarily in his own behalf in order to let in the evidence of the surviving party.² The statute is not applicable when a defendant to a suit in equity dies after his sworn answer³ containing matter which is admissible in evidence has been filed, or where a party dies after his adversary has been examined,⁴ or where the executor is suing on his own title.⁵

The courts have adopted liberal rules of construction in construing the meaning of the words which indicate representation or succession which occur in statutes providing that parties or interested witnesses shall not be competent to testify in actions by or against the representatives or heirs of a decedent.⁶ Thus, it has been held that the word "representative" includes heirs,⁷ legatees⁸ and devisees.⁹ The general principle is that so long as the judgment will affect, whether favorably or otherwise, the value of the estate of the deceased person, the relation in which the representative stands to it or the form in which he sues, whether individually¹⁰ or as a representative, is not material.¹¹

The true end and object of these statutes are to close the mouth of a party to a contract or other transaction whenever the other party is dead or otherwise incapacitated from

¹ *Lewis v. Merritt*, 113 N. Y. 388.

² *Corning v. Walker*, 100 N. Y. 550; *Rankin v. Hannan*, 38 Ohio St. 438.

³ *Sweet v. Parker*, 22 N. J. Eq. 455; *Lanning v. Lanning*, 17 id. 228. But cf. *Beckhaus v. Ladner*, 48 id. 152.

⁴ *Marlatt v. Warwick*, 18 N. J. Eq. 108.

⁵ *Hodges v. Carvill*, 44 N. J. L. 456.

⁶ *Marshall v. Peck*, 91 Ill. 187; *Dewey v. Goodenough*, 56 Barb. 54; *Green v. Edick*, 56 N. Y. 696; *Lloyd v. Hollenback* (Mich., 1893), 57 N. W. Rep. 110.

⁷ *Ferbrache v. Ferbrache*, 110 Ill. 210; *Ellis v. Stewart* (Tex., 1894), 24 S. W. Rep. 585.

⁸ *Curtis v. Wilson* (Tex., 1893), 21 S. W. Rep. 787.

⁹ *Jass v. Mohn* (R. I., 1893), 26 Atl. Rep. 787.

¹⁰ *Louis v. Easton*, 50 Ala. 470.

¹¹ *Hollister v. Young*, 41 Vt. 456. It has been held, however, that "representative" should be strictly construed as signifying only a party who represents another on the record. *Crimmins v. Crimmins*, 43 N. J. Eq. 87.

testifying in his own behalf, and where his rights have passed by his own act or by the act of the law to some other person who represents him or his estate in the action, but whose sources of original information as regards the transaction in question are so inadequate as compared with the other and surviving party that the representative is presumed to be utterly unable to testify as to any of the details of the transaction.¹ In case the statute is in its form a proviso in or a mere exception from a statute abolishing the incompetency of interested witnesses at common law, then, if the party or interested person would have been competent at common law as a witness against the estate of the deceased person, he is so against his representative.² But the evidence of an interested witness is absolutely excluded by a statute of this sort which is an independent and affirmative enactment.³

These statutes have been construed liberally with the sole object of placing the parties, living or deceased, upon an equality so far as the evidence of the transaction is concerned. The fact that one only of several persons jointly sued represents a deceased person is enough to render the adverse party incompetent,⁴ though where one of several joint parties, as, for example, the members of a firm, is deceased, and it appears that he took no active part in the transaction or had no knowledge of it, his death before the suit is brought will not render the actual parties to the transaction incompetent as witnesses.⁵ But under such circumstances, when the deceased partner had full personal knowledge, and the surviving partner, though equally bound, had very little, if any, knowledge of the transaction, the adverse party will not be allowed to testify.⁶

¹ Taylor v. Dusterberg, 109 Ind. 165; Paxton v. Paxton (W. Va., 1894), 18 S. E. Rep. 765; Louis v. Easton, 50 Ala. 470; Johnson v. Heald, 33 Md. 352; Hubbell v. Hubbell, 22 Ohio St. 208; Brown v. Brightman, 11 Allen (Mass.), 226.

² Fink v. Hey, 42 Mo. App. 295; Bates v. Forcht, 89 Mo. 120; Beach v. Pennell, 50 Me. 387; Sykes v. Bates, 26 Iowa, 522; Angell v. Hester, 64 Mo. 142.

³ Mattoon v. Young, 45 N. Y. 696.

⁴ Force v. Dutcher, 22 N. J. Eq. 453; Godfrey v. Templeton (Tenn., 1888), 6 S. W. Rep. 47.

⁵ Hardy v. Chesapeake Bank, 51 Md. 596; Fulkerson v. Thornton, 68 Mo. 468.

⁶ Wiley v. Morse, 30 Mo. App. 266; Campbell Banking Co. v. Cole (Iowa, 1893), 56 N. W. Rep. 441; Williams v. Perkins, 83 Mo. 379.

§ 309. What are transactions with decedents.— The phrase “personal transaction,” while not to be defined in the abstract,¹ does not include evidence of the birth of a deceased person,² or of his physical³ or mental condition,⁴ or an opinion upon the value of services⁵ rendered him or board or supplies furnished him by the plaintiff or by some other person than the witness,⁶ or evidence of the fact of a conversation having been had, where this fact is collateral merely.⁷ An interested witness may testify to a conversation or transaction by the deceased with a co-party to the record,⁸ or with some third person who is still living,⁹ at which the witness was present and overheard what was said, provided the witness did not himself participate in the conversation.¹⁰ So the general rule is that the interested witness may testify to a transaction or conversation which he had with an agent of the deceased who is still alive¹¹ and who disclosed the name of the principal,¹² or may testify that a contract on which he sues is in deceased’s

¹ Abbott’s Trial Evidence, p. 68.

² Matter of Paige, 62 Barb. 476.

³ In re McCarthy, 65 Hun, 624; Sullivan v. Latimer (S. C., 1893), 17 S. E. Rep. 701.

⁴ Williams’ Ex’r v. Williams (Ky., 1890), 13 S. W. Rep. 250; Carey v. Carey, 104 N. C. 171; Ducker v. Whitson (N. C., 1893), 16 S. E. Rep. 854.

⁵ Lewis v. Meginnis, 30 Fla. 419.

⁶ Pritchard v. Pritchard, 69 Wis. 373.

⁷ Loder v. Whelpley, 111 N. Y. 239; Daniels v. Foster, 26 Wis. 286; Hier v. Grant, 47 N. Y. 273. A party offering evidence which is *prima facie* objectionable under these statutes must show at the trial that as limited by him it does not infringe the statute. Rhodes v. Pray, 36 Minn. 395. “A transaction is whatever may be done by one person affecting another’s rights, and out of which a cause of action may arise. A contract is a transaction, but a transaction is not always a contract.” Scarborough v. Smith,

18 Kan. 406; Roberts v. Donovan, 70 Cal. 113.

⁸ Smith v. James, 34 N. W. Rep. 309.

⁹ Hughey v. Eichelberger, 11 S. C. 36; Lehigh v. Railroad Co., 41 N. J. Eq. 187; Petrie v. Petrie, 6 N. Y. S. 831; Stern v. Isman, 51 Hun, 224; Connelly v. O’Conner, 17 N. Y. State Rep. 261; In re Budlong, 7 N. Y. S. 229; Badger v. Badger, 88 N. Y. 559.

¹⁰ Connelly v. O’Conner, 17 N. Y. State Rep. 261; Stern v. Eisner, 51 Hun, 224; Lobdell v. Lobdell, 36 N. Y. 327; Holcomb v. Holcomb, 95 N. Y. 325; Petrie v. Petrie, 6 N. Y. S. 831; Cary v. White, 59 N. Y. 336; Badger v. Badger, 88 N. Y. 336.

¹¹ Pratt v. Elkins, 80 N. Y. 198; Reherd v. Clem, 86 Va. 374; Cairns v. Mooney, 63 Vt. 172; Orr v. Rode, 101 Mo. 387 (trustee of deceased trustor). *Contra*, Sutherland v. Ross, 140 Pa. St. 379; 21 Atl. Rep. 354; 23 W. N. C. 17. *Cf.* Voss v. King, 33 W. Va. 236, where agent and principal were both dead.

¹² Stamford v. Hornitz, 49 Ind. 525.

handwriting,¹ though not that he saw him sign it. The surviving party may testify as to his place of residence when he had the transaction with the deceased, that being no part of the transaction itself.²

The term "contract in issue" in a statute rendering a surviving party thereto incompetent signifies the contract which is substantially in dispute and not that which appears upon the formal allegations of the pleadings.³ Testimony is admissible of facts occurring after the decease of the party under a statute which renders incompetent evidence of personal transactions with him.⁴ Nor is such evidence objectionable because the jury may infer from it the existence of a personal transaction with the deceased party.⁵ The rule excluding evidence of a personal transaction with a deceased person operates to prevent the survivor from testifying to the contents of a letter sent to the deceased,⁶ or to the fact that a letter was delivered to him,⁷ though it does not prevent the introduction of a writing executed by him. The writing cannot be explained by the testimony of a party or interested witness⁸

The mere fact that a third person was present at an interview between the deceased and a surviving party does not render the latter competent. *Hatch v. Perignet*, 64 Barb. 189; *Hutchison v. Cleary*, 55 N. W. Rep. 729; *Burnham v. Cleary*, 34 Wis. 117.

¹ *Sawyer v. Grandy* (N. C., 1893), 18 S. E. Rep. 79. *Contra*, *Holliday v. McKinnie*, 23 Fla. 153.

² *Trimble v. Mims* (Ga., 1894), 18 S. E. Rep. 362. Where a statute in terms excludes the testimony of parties and interested witnesses "in any action upon a claim or demand against the estate of a deceased person," it has been held that the statute does not operate in an action to enforce a mechanic's lien which is in the nature of a proceeding *in rem*. *Booth v. Pendola* (Cal., 1890), 23 Pac. Rep. 200. But the contrary was held in *Gunther v. Bennett* (Md., 1890), 19 Atl. Rep. 1048.

³ *Barnes v. Dow*, 59 Vt. 545.

⁴ *Kreps v. Carlisle* (Pa., 1893), 27 Atl. Rep. 741; *Swazey v. Ames*, 79 Me. 483; *Gifford v. Thomas* (Vt., 1890), 19 Atl. Rep. 1088.

⁵ *In re Debaun*, 4 N. Y. S. 342; *Porter v. Nelson*, 121 Pa. St. 640; *Moore v. Dutson*, 79 Ga. 456; 5 S. E. Rep. 38; *Rothrock v. Gallaher*, 91 Ga. id. 108; *Griffin v. Griffin*, 17 N. E. Rep. 782; 125 Ill. 430. It is held that the witness cannot testify to a relationship or condition which existed after the death of the party which was founded on a personal transaction with him prior thereto. *Denison v. Denison*, 35 Md. 361; *Adams v. Edwards*, 115 Pa. St. 211; *Adams v. Morrison*, 118 N. Y. 152.

⁶ *Sabre v. Smith*, 62 N. H. 663.

⁷ *Howard v. Zimpelman* (Tex., 1890), 14 S. W. Rep. 59.

⁸ *Miller v. Motter*, 35 Md. 428; *Berry v. Stevens*, 69 Me. 290.

when offered against the executor, though it may be explained or contradicted when offered ¹ in his behalf, as by such action the representative has opened the door for the adverse party.

The prohibition of the introduction of evidence of a personal transaction with the deceased should be construed, not only to prevent the introduction of direct proof of such a transaction, but to prevent its proof by indirection as well. So the surviving party should not be permitted to attempt to prove the transaction inferentially by offering evidence that some third person did not do the thing which the deceased is alleged to have done, or by disconnecting any particular fact from its surroundings and proving it as a seemingly independent fact, when in truth it originated in, was caused by or was connected with a personal transaction evidence of which is inadmissible.²

Whether a transaction is within the statute is a preliminary question for the court,³ and the witness who is about to testify may be interrogated by the court as to what passed and whether he was a privy to the transaction or was disinterested and merely overheard a conversation of the deceased with some third person.⁴ The death of the party whose representative objects to the admission of the evidence may usually be shown *prima facie* by the letters under which he acts,⁵ though if a party sued individually defends as an administrator and claims the statutory privileges of a representative, he must have established his title and representative status in some preliminary proceedings.⁶

§ 310. Persons interested — Their statutory incompetency.—In some of the states it is provided by statute that no person whatever who is interested in the event of an action, or any person from whom a party or interested person derives his interest, can testify in his own behalf or in behalf of a party claiming under him against the personal representative of a deceased or insane person as to any personal conversation or transaction with the latter.⁷ The interest which

¹ Hubbard v. Johnson, 77 Me. 139.

⁵ Parhan v. Moran, 4 Hun, 717.

² Clift v. Moses, 112 N. Y. 426; 21 N. Y. State Rep. 777.

⁶ Prewitt v. Lambert (Colo., 1893), 34 Pac. Rep. 684.

³ Abbott's Trial Ev., 66.

⁷ New York Civ. Pro., § 829;

⁴ Isenhour v. Isenhour, 64 N. C. 640; Abbott's Trial Ev., 66.

Illinois R. S., ch. 51, sec. 1; Shields v. Smith (N. C., 1893), 10 S. E. Rep.

will disqualify a witness who is not a party to the action must be direct, pecuniary and beneficial,¹ such as would render him incompetent at common law.² So if the witness is equally interested on both sides,³ or if his interest is very contingent or remote, he will be allowed to testify.⁴ An heir, legatee or devisee of a party is an interested person, and hence is incompetent to testify against the representative of a deceased person.⁵

The term "person from whom the party or interested witness derives his title" includes not only his immediate assignor, but all prior grantors or assignors.⁶ An interested witness

76; California Code, § 1880, cl. 3; Florida Laws, ch. 101, § 24; Iowa Rev. Code, 1886, § 3639; Maine R. S. 1833, ch. 82, § 98; Montana Stat. Code Civ. Pro., § 647; Nevada Gen. Stat. 1885, § 3399; North Carolina Code, 1883, §§ 189, 590, 1357; Ohio R. S. 1886, §§ 5240, 5241, 5242; West Virginia Code, ch. 130, § 23.

¹ *Fuchs v. Fuchs*, 48 Mo. App. 18; *Nearpass v. Gilman*, 104 N. Y. 210; *Fowler v. Smith*, 153 Pa. St. 639; *In re Bedlow's Will*, 67 Hun, 408; *Bowers v. Schuler* (Minn., 1893), 55 N. W. Rep. 817; *Graves v. Safford*, 41 Ill. App. 659; *In re Taylor*, 154 Pa. St. 183; *Bunn v. Todd*, 107 N. C. 226; *Fogal v. Page*, 59 Hun, 625; *Allen v. Hawks*, 13 Pick. 70; *Hobart v. Hobart*, 62 N. Y. 80; *Stewart v. Kip*, 5 Johns. 256; *Shaack v. Meily*, 136 Pa. St. 161; 26 W. N. C. 569.

² *Beard v. First Nat. Bank*, 39 Minn. 547.

³ *Scott v. Harris*, 127 Ind. 520.

⁴ *Huckabee v. Abbott*, 87 Ala. 409; *Nearpass v. Gilman*, 104 N. Y. 507; *Harrow v. Brown*, 76 Iowa, 179; *Clark v. McNeal*, 114 N. Y. 289; *Rank v. Grote* (N. Y., 1888), 17 N. E. Rep. 665; *Wallace v. Straus*, 113 N. Y. 238; *Duryea v. Granger* (Mich., 1887), 33 N. W. Rep. 730. The son of a party to an action is not by reason of his relationship a person

interested whose evidence is incompetent. *New York Smelting Co. v. Lieb*, 4 N. Y. S. 545; 56 Super. Ct. Rep. (N. Y.) 308.

⁵ *Loder v. Whelpley*, 111 N. Y. 239; *Mills v. Davis*, 113 N. Y. 243; *Kerr v. Lunsford*, 31 W. Va. 659; *In re Eysamen*, 113 N. Y. 62. *Cf. Staser v. Hogan*, 21 N. E. Rep. 911; *Todd v. Dibble*, 6 Dem. Sur. 35; *Brigham v. Gott*, 3 N. Y. S. 518; *Smith v. Pierce* (Vt., 1893), 25 Atl. Rep. 1092; *Dickson v. McGraw*, 151 Pa. St. 98; *West v. Randall*, 2 Mason, 181; *Payne v. Kerr*, 66 Hun, 636; *In re Bedlow*, 67 Hun, 408; *Carlile v. Burley*, 3 Greenl. 250. A widow whose inchoate right of dower will attach to land recovered is interested in the event. *Crane v. Crane*, 81 Ill. 166; *Ervin v. Ervin*, 18 Civ. Pro. Rep. 11; *Redfield v. Redfield*, 110 N. Y. 674; *Warrick v. Hull*, 103 Ill. 280. *Cf. Miller v. Montgomery*, 78 N. Y. 285; *Sanford v. Ellithorpe*, 95 N. Y. 48; *Eisenlord v. Eisenlord*, 2 N. Y. S. 123; *Steele v. Ward*, 30 Hun, 355; *Devinney v. Carey*, 23 N. Y. State Rep. 208; 5 N. Y. S. 289 (holding that a tenant by the curtesy is an interested person).

⁶ *Parcell v. McReynolds* (Iowa, 1887), 33 N. W. Rep. 139; *Pope v. Allen*, 90 N. Y. 298; *Drew v. Simmons*, 58 Ala. 463; *Stackable v.*

may be made competent by absolutely releasing his claims,¹ though he may be asked if the assignment was made solely to qualify him as a witness;² and if it is not a *bona fide* assignment he will be still incompetent.³

Where the statute expressly refers to parties as incompetent it is held that third persons merely interested in the event are not included thereby.⁴ So where those having "adverse interests" are mentioned, witnesses whose interests are not adverse to the deceased may be permitted to testify in behalf of the surviving party.⁵ The evidence given by a surviving party or by an interested person of personal transactions with the deceased will not be rejected by the court of its own motion,⁶ but the objection to the witness, which must specifically point out the grounds,⁷ must be taken by the administrator or other party acting in a representative capacity,⁸ and it will be deemed to have been waived if it is not promptly made by him.⁹

Upon the question whether the death or insanity of an agent or other fiduciary representative of a party to a contract will render the testimony of the other party or of an

Stackpole (Mich., 1887), 32 N. W. Rep. 808.

¹ O'Brien v. Weiler, 68 Hun, 64; Genet v. Lawyer, 61 Barb. 211; In re Wilson, 103 N. Y. 374; Loder v. Whelpley, 111 id. 239; Brown v. Clock, 5 N. Y. Supp. 245.

² Buck v. Patterson, 75 Mich. 397.

³ Bonstead v. Cuyler (Pa., 1887), 8 Atl. Rep. 848.

⁴ Rawson v. Knight, 73 Me. 340; Spencer v. Robbins, 106 Ind. 580; Bassett v. Shepardson, 52 Mich. 3; Wilson v. Russell, 61 N. H. 355; Lytle v. Bond, 40 Vt. 618; Pendell v. Neuberger, 31 N. W. Rep. 177.

⁵ Gerz v. Weber, 151 Pa. St. 396; Thistlewaite v. Thistlewaite, 132 Ind. 355; Howle v. Edward (Ala., 1893), 11 S. Rep. 748; Hammill v. Sup. Council, 152 Pa. St. 537.

⁶ Rowland v. Rowland, 40 N. J.

Eq. 281. *Contra*, Sherman v. Lanier, 39 N. J. Eq. 253.

⁷ Lewin v. Russell, 42 N. Y. 251.

⁸ Marcy v. Amazeen, 61 N. H. 133.

⁹ Parrish v. McNeal (Neb., 1893), 55 N. W. Rep. 222; Norris v. Stewart's Heirs, 105 N. C. 455; 10 S. E. Rep. 912. *Cf.* Sager v. Dorr, 4 N. Y. S. 568; Dilley v. Love, 61 Md. 607. If the objection is taken before judgment it seems that it will suffice. Dodge v. Stanhope, 55 Md. 121. Or if evidence to rebut it is offered. Phillips v. McGrath, 62 Wis. 124. But it was held that the erroneous reception of evidence inadmissible under these statutes is cured where the opposite party fails to attempt to rebut the fact which has been testified to in case the burden of doing so is on him. Wheeler v. Wheeler, 18 N. Y. State Rep. 445; 2 N. Y. S. 443.

interested person incompetent the cases are not harmonious. The weight of the decisions sustains the rule that the adverse party will not be allowed to testify to any conversation or transaction he may have had with the deceased agent.¹ But the contrary doctrine is not without the support of authority.²

§ 311. Incompetency of parties to negotiable instruments to impeach them.—In many of the early English cases,³ in the supreme court of the United States,⁴ and in the courts of several of the state commonwealths, a rule has been laid down that a party to a negotiable instrument, *i. e.*, the maker or indorser thereof, is incompetent in a subsequent suit brought on the instrument to testify as a witness to any fact impeaching the instrument which existed when he signed or indorsed the note or other negotiable security.⁵ The basis of this exclusory rule is generally stated to be that it is contrary to sound public policy and good morals to allow a person who has, for his own benefit, giving currency and circulation to a negotiable instrument, to state facts which might invalidate it in the hands of a *bona fide* purchaser or holder for value. However true this view may be in case the person is himself a party—and certainly as a party he should be estopped, upon general principles of estoppel, from impeaching his own deliberate act,—it does not seem applicable where third parties only are in litigation, if the witness knows the discrediting fact and if that

¹ Whiting v. Traynor, 74 Wis. 293; Sabler v. Shef. S. Co., 87 Ala. 305; Warten v. Strane, 82 Ala. 311 (clerk); Mobile S. Bank v. McDonnell, 87 id. 736; Johnson v. Hart, 82 Ga. 767; Kansas M. Co. v. Wagner, 25 Neb. 439.

² Farmers' Ins. Co. v. Insurance Co., 40 Minn. 152; Sprague v. Bond (N. C., 1894), 18 S. E. Rep. 701; South Baltimore Co. v. Muhlback, 69 Md. 395; First Nat. Bank v. Cornell, 41 Ohio St. 401; Reynolds v. Iowa Ins. Co., 80 Iowa, 563; 46 N. W. Rep. 659.

³ Walton v. Shelley, 1 T. R. 296, cited in Greenl. on Ev., § 333.

⁴ United States v. Leffler, 11 Pet.

56; Henderson v. Anderson, 3 How. (U. S.) 73.

⁵ Fox v. Whitney, 16 Mass. 118; Shamburg v. Commagere, 5 Martin (La.), 9; Sweeny v. Easter, 1 Wall. 166; Haddock v. Wilmarth, 5 N. H. 187; Dewey v. Warriner, 71 Ill. 198; Fox v. Whitney, 16 Mass. 118; Strong v. Wilson, 1 Morris (Iowa), 84; Dearing v. Sawtelle, 4 Greenl. (Me.) 191; Treon v. Brown, 14 Ohio, 432; Rohrer v. Morningstar, 18 Ohio, 579; Thayer v. Crossman, 1 Metc. (Mass.) 416; Gaul v. Willis, 26 Pa. St. 259. The rule is not invoked in case the party has indorsed "without recourse." 2 Pars. on Pr. N. & B. 470; Abbott v. Mitchell, 6 Shepl. 553.

fact is one of which the law allows proof.¹ The rule has been repudiated both in England and in America by the majority of the cases.² In any case it is only applicable to negotiable paper issued in the usual course of trade before maturity,³ and does not apply between the original parties or to those who take the paper with notice of any equitable defenses good as between the parties.⁴ The rule does not render the person incompetent as a witness to any facts which have taken place subsequent to his act of indorsement,⁵ or to facts not in any way impairing or discrediting the validity of the instrument.⁶

§ 312. **Competency of counsel as witnesses.**—By some of the early cases it was held, not indeed as a positive rule of law, but rather as a matter of propriety and procedure deemed necessary to the impartial administration of justice, that an attorney-at-law could not testify for his client in the cause in which he was engaged.⁷ But the modern rule is otherwise, and counsel are competent witnesses for a party as to all facts which are within their personal knowledge,⁸ though the practice of receiving this sort of testimony should not, it seems, be encouraged,⁹ in view of the bias with which the mind of the

¹ Abbott's Trial Evidence, § 417.

² Stafford v. Rice, 5 Cowen, 23; Guy v. Hull, 3 Murph. (N. C.) 150; Griffing v. Harris, 9 Port. (Ala.) 225; Taylor v. Beck, 3 Rand. (Va.) 216; Jackson v. Parker, 13 Conn. 352; Freeman v. Britton, 2 Harr. (N. J.) 191; Knight v. Packard, 3 McCord, 71; Slack v. Mass, Dud. (Ga.) 161; Abbott v. Ross, 62 Me. 194; Stump v. Napier, 2 Yerger (Tenn.), 35; Todd v. Stafford, 1 Stew. (Ala.) 199; Gorham v. Carroll, 3 Litt. (Ky.) 121; Ringgold v. Tyson, 3 Harr. & J. 172; Parsons v. Phipps, 4 Tex. 341; Bank v. Hull, 7 Mo. 273; Williams v. Walbridge, 3 Wend. 415; Orr v. Lacey, 2 Doug. 230.

³ Parke v. Smith, 4 Watts & S. 287; Rohrer v. Morningstar, 18 Ohio, 579; Thayer v. Crossman, 1 Metc. 416.

⁴ Bubier v. Pulsifer, 4 Gray (Mass.), 592.

⁵ Haines v. Dennett, 11 N. H. 180.

⁶ Sweeney v. Easter, 1 Wall. 166.

⁷ Stones v. Byron, 4 Dowl. & L. 393; Dunn v. Packwood, 11 Jur. 242; Mishler v. Baumgardner, 1 Am. L. J. 304.

⁸ Little v. Keon, 1 N. Y. Code R. 4; Linton v. Com., 46 Pa. St. 294; Follansbee v. Walker, 72 Pa. St. 230; State v. Cook, 23 La. Ann. 347; Potter v. Ware, 1 Cush. 519, 524; Mealer v. State (Tex., 1893), 22 S. W. Rep. 142. Cf. Traser v. Haggerty, 86 Mich. 521.

⁹ Gardner v. Benedict, 27 N. Y. S. 3. As to privileged communications to attorneys, see §§ 169-174. In Cook v. United States, 11 S. Ct. 268; 138 U. S. 157, counsel for the defendant was examined by the prosecution as to matters not privileged.

counsel is imbued because of his relation to the parties to the action.

§ 313. Competency of judge as a witness.—In consequence of the peculiar province and duties of the judge presiding in a cause, it has been considered objectionable, if not highly improper and erroneous, for him to act as a witness in the same case. Aside from the objection that his conduct should not be subjected to cross-examination and comment, his peculiar duties in administering oaths to the witnesses, in case the court has no clerk, in adjudicating upon their competency and the admissibility of the evidence, with his power to commit for contempt, render it unfit that he should assume the dual character of witness and judge in the same cause.¹ So upon analogous reasoning it has been held that, where a cause was pending before several referees, one of them could not be sworn or examined as a witness by the others.² But while these considerations are reasonable they do not apply in the trial of a case in which the witness, though he is a judge, is not presiding in that case; and hence it is a rule that a judge may testify, as, for example, to the accuracy of the notes which he has taken at a former trial.³

§ 314. The incompetency of arbitrators as witnesses in an action on the award.—An arbitrator is a competent witness to prove any facts upon the existence of which his authority as an arbitrator depended. In an action to enforce the award he may be required to testify as to what matters were included in the submission,⁴ or what subjects actually came before him for action,⁵ and what matters were actually

¹ *Baker v. Thompson*, 89 Ga. 486; (N. Y.) 197; *Ross v. Buhler*, 2 Mart. Buecleugh v. Board, L. R. 5 H. L. 418, 433; *People v. Miller*, 2 Parker C. R. 197; *Rex v. Harvey*, 8 Cox C. C. 103; *Regina v. Gazard*, 8 C. & P. 595. See *ante*, § 175.

² *Morss v. Morss*, 11 Barb. 310.

³ *State v. Duffy*, 57 Conn. 525; *People v. Dohring*, 59 N. Y. 374; *Morss v. Morss*, 11 Barb. (N. Y.) 510; *Shall v. Miller*, 5 Whart. (Pa.) 156; *People v. Miller*, 2 Park. Cr. Cas. Eng. 448.

(N. Y.) 197; *Ross v. Buhler*, 2 Mart. N. S. (La.) 312; *Welcome v. Batchelder*, 23 Me. 85.

⁴ *Republic Bank v. Darragh*, 30 Hun (N. Y.), 29; *Thrasher v. Overly*, 51 Ga. 91; *Hale v. Huse*, 10 Gray (Mass.), 99; *Hall v. Vanier*, 6 Neb. 85; *Birbeck v. Burrows*, 2 Hall, 51; *Cady v. Walker*, 62 Mich. 157.

⁵ *Duke of Buccleugh v. Board*, L. R. 5 H. L. Cas. 418; 2 Moak's

considered by him.¹ So an arbitrator may testify to the fact that an award was made and delivered, and, if it was oral, he may be asked to state it on the witness stand.² But an arbitrator is not a competent witness to impeach the legality or validity of the award, or to show the impropriety of his own actions in connection therewith, unless he dissented from the award. His voluntary assent to or acquiescence in the award as rendered will estop him from denying its validity subsequently.³ Neither can he be interrogated as to his reasons or the motives which actuated him while exercising the *quasi-judicial* and discretionary powers over the matter submitted to him for arbitration.⁴

§ 315. Definition and form of oath and affirmation.—An oath has been defined as “an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God.”⁵ This definition, it should be noticed, omits entirely the imprecatory character which was so prominent in the definitions of the earlier writers on evidence,⁶ and is certainly more consonant with modern ideas upon this subject and less calculated to give offense to any who may have conscientious scruples against invoking the anger of Deity upon themselves.

Oaths are divided into two classes: *judicial oaths*, which are taken during a judicial proceeding, according to legal direction or requirement, and *extra-judicial oaths*, which are taken without any express authority or direction of law.⁷ Judicial oaths are usually administered by the clerk of the court, who repeats the following formula to the witness: “You

¹ Mayor of New York v. Butler, 1 Barb. 325; Cole v. Blunt, 2 Bosw. 116.

² Boughton v. Seamans, 9 Hun, 392.

³ Newland v. Douglas, 2 Johns. 62; Jackson v. Gager, 5 Cow. 383; Tucker v. Page, 69 Ill. 179; Campbell v. Weston, 3 Paige, 124.

⁴ In re Whiteley (1891), 1 Ch. 558; Chapman v. Ewing, 78 Ala. 403; Aldrich v. Jessiman, 85 N. H. 516;

Cobb v. Dortch, 52 Ga. 548; Alexander v. McNear, 28 Fed. Rep. 403; Tucker v. Page, 69 Ill. 179; Jackson v. Gager, 5 Cow. (N. Y.) 383.

⁵ Tyler on Oaths, p. 15. For other definitions, see Anderson's Law Dict., citing Parkes v. Parkes, 25 E. L. & E. 619; King v. White, 2 Leach Cr. Cas. 482.

⁶ 1 Stark. Ev. 22.

⁷ Anderson's Law Dict.

do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, as a witness in this issue now joined between A. and B. So help you God." The assent of the witness is expressed by his uplifted hand or by his placing his hand upon a copy of the Gospels while the oath is being repeated, and by his kissing the Bible at its close.¹ But no particular form of administering the oath was or is required so long as the witness is sworn in such a way as he will consider binding upon his conscience.²

Where a witness, when about to be sworn, says that he is an adherent of a religious faith other than Christianity, he should be asked what oath he would consider most binding, and if he prefers any other than the usual form he should be sworn accordingly.³ Even in the case of a witness who is a Christian, his wishes and scruples will be respected, and if he shall object to being sworn upon the Gospels his solemn affirmation will be regarded as equivalent thereto.⁴ A witness

¹See *Jackson v. State*, 1 Ind. 185; *State v. Norris*, 9 N. H. 101.

²In *Omichund v. Barker*, Willes, 545, 547, the court said: "Oaths were instituted long before the beginning of the Christian era, and were always held in the highest veneration. The substance of an oath has nothing to do with Christianity. The forms have always been different in different countries. But still the substance is the same, which is that God in all of them is called upon to witness the truth of what we say. Such infidels who believe in a God and that he will punish them if they swear falsely may testify."

³*Omichund v. Barker*, 1 Atk. 21, 46; *Atchison v. Everett*, Cowp. 389, 390; *People v. Green* (Cal., 1893), 34 Pac. Rep. 231; *State v. Chyo Chiagk*, 92 Mo. 395.

⁴*State v. Welch*, 79 Me. 99. Many persons, construing the scriptural injunction "Swear not at all" as an express prohibition of oaths of every

sort, refuse, because of conscientious principle, to participate in or assent to any form of words which involves an invocation of the Deity. To such persons an interrogation somewhat in the following form is usually propounded: "You do solemnly, sincerely and truly declare and affirm that you will state the truth, the whole truth, and nothing but the truth, in the issue now joined between A. and B." An affirmative reply to this question is equivalent to an oath, and renders the witness liable to a prosecution for perjury in case he testifies falsely. But it is now held in England that the witness should be asked by the judge whether the ground of his refusal to be sworn is a lack of religious belief or whether he objects to taking an oath. If the witness declares he has a religious belief he should be required to take an oath. *Reg. v. Moore*, 61 Law J. Mag. 80; 17 Cox Cr. Cas. 458.

may, *after being sworn*, be asked if he considers the oath he has taken as binding, though it would be improper then to ask him if any other form would be deemed by him to be of greater force;¹ for he is liable to be punished for perjury, though he does not consider himself bound by the form of oath by which he was sworn, if he failed to object at the time of swearing.² If the witness is sworn before a separate trial is ordered in the case of several jointly indicted, he must be again sworn thereafter.³

The objection that a witness was not properly sworn cannot be raised for the first time when a motion is made for a new trial,⁴ unless the omission to swear him was not noticed by the objecting party until after the trial had been finished.⁵

The power to administer oaths is usually conferred upon private arbitrators by statute. At common law they did not possess it,⁶ and an oath administered by an arbitrator was a nullity so far as a prosecution of the witness for perjury was concerned.⁷ The parties to the arbitration may, however, unless the witness is absolutely required to be sworn by a statute,⁸ waive the taking of an oath by the witness.⁹ After the waiver, which may be by express language or by necessary

¹ The Queen's Case, 2 Brod. & Bing. 284.

² State v. Whisenhurst, 2 Hawks, 458. The clerk will be allowed, where a defendant has many *aliases*, to repeat them in swearing a witness, stating also his true name. If the *aliases* are given in the indictment, their repetition by the clerk in the hearing of the jurors is not calculated to prejudice them against the prisoner. People v. Everhart, 104 N. Y. 591; 11 N. E. Rep. 62.

³ Abbott, Crim. Brief, § 336; Babcock v. People, 15 Hun (N. Y.), 347.

⁴ Goldsmith v. State (Tex., 1893), 22 S. W. Rep. 405.

⁵ Hawks v. Baker, 6 Greenl. (Me.) 72. In a trial for a felony it is ground for reversal to swear a witness while the accused is not in court. Bear-den v. State, 44 Ark. 331.

⁶ Rice v. Hassenpflug, 13 N. E. Rep. 655; 45 Ohio St. 477; Large v. Passmore, 5 S. & R. (Pa.) 51; People v. Townsend, 5 How. Pr. (N. Y.) 315.

⁷ Frazer v. Phelps, 3 Sandf. (N. Y.) 741; Bonner v. McPhail, 31 Barb. (N. Y.) 106.

⁸ Wolfe v. Hyatt, 76 Mo. 156.

⁹ Newcomb v. Wood, 7 Otto (U. S.), 581; Cochran v. Bartell, 91 Mo. 655; 3 S. W. Rep. 854; Maynard v. Frederick, 7 Cush. 247; Price v. Perkins, 2 Dev. Eq. (N. C.) 250. An arbitrator who possesses no statutory power to administer an oath should call in a notary or other officer who has that power. Russell on Arbitration, 189. See Rice v. Hassenpflug, 45 Ohio St. 377; 13 N. E. Rep. 655.

implication from the conduct or the silence of a party, he cannot claim to have an award set aside for the sole reason that the witnesses were not sworn.¹

§ 316. Incompetency because of a lack of religious belief.

At common law, in consequence of the paramount importance attached to the religious element of an oath, all persons whose religious faith did not involve the belief in a Deity who would punish falsehood were incompetent as witnesses.² So it was said, to require an oath to be taken by one who, like the atheist, "was presumed to be unable to appreciate its religious sanction, was a mockery of justice."³ Every person born and educated under the influence of Christianity was *prima facie* presumed to possess sufficient religious faith to render him competent as a witness. In any case he was only required to believe in a God who would punish perjury, and it was of no consequence whether he believed that the perjurer would be punished by remorse of conscience in this life or beyond the grave in some other way.⁴ The witness could not usually be directly questioned as to his possession of a religious belief, though his atheism might always be shown by the evidence of other persons in whose hearing he had voluntarily declared his lack of religious belief;⁵ and the fact that he had subsequently acquired sufficient religious faith to render him competent might also be shown.⁶

It is now the law by statute in almost every state in the Union that no witness shall be considered incompetent because of his belief or disbelief in the tenets of any system of religious faith, provided he understands the nature of an oath. In conformity with the principles underlying such statutory enactments, and having regard to existing federal and state constitutional guaranties intended to secure freedom of relig-

¹ Cochran v. Bartell, 91 Mo. 655.

² Omichund v. Barker, 1 Atk. 21.

³ See *ante*, § 315.

⁴ 1 Greenl. on Ev., § 369; People v. Matteson, 2 Cowen, 433, 473; Crappell v. State, 71 Ala. 324; Brock v. Milligan, 10 Ohio, 123, 125; Blocker v. Burness, 2 Ala. 355; Arnold v. Arnold, 13 Vt. 43, 362; Hunscom v. Hunscom, 15 Mass. 184; 3 Bl. Com.

369; Bush v. Com., 80 Ky. 248, 250.

See Com. v. Hills, 10 Cush. 532;

Hale v. Everett, 53 N. H. 55; Gibson v. Mut. L. Ins. Co., 37 N. Y. 584, for definitions of "atheist" and "infidel."

⁵ Odell v. Koppel, 5 Heisk. (Tenn.) 88; Com. v. Smith, 2 Gray, 516.

⁶ Atwood v. Welton, 7 Conn. 66; Scott v. Hooper, 14 Vt. 535.

ious belief, any question tending to discredit the witness by showing his atheism or agnosticism is decidedly objectionable.¹ So where, by constitutional enactment, it is provided that no person shall be denied the enjoyment of any civil rights on account of his religious principles, it is held that a party is not incompetent as a witness in his own behalf because he did not believe in a God that would punish false swearing.²

§ 317. Incompetency of insane persons as witnesses.—The common law recognized little, if any, distinction between the numerous forms which insanity assumes. Thus, a person mentally unsound in any respect, whether he was an imbecile or idiot, a furious maniac or a quiet sufferer from melancholia, senile dementia or some harmless and perhaps temporary monomania, was incompetent as a witness,³ though if the existence of a lucid interval was properly established he was permitted to testify.

It is now well established that the insanity or intellectual weakness of a witness, no matter what shape it may take, is no objection to his competency, provided he has mental capacity sufficient to discern between right and wrong, so far as the facts at issue and his testimony thereon are involved, understands the binding character of an oath,⁴ and can give an apparently intelligible and reasonable account of any transaction which he has seen or heard.⁵ Nor is a party prevented from testifying because he alleges and offers evidence to show his own mental impairment.⁶ A witness who is examined by a commission out of court will be presumed to be

¹ *People v. Copsey*, 71 Cal. 548.

Crim. Ev. 128; *Best's Ev.*, p. 168;

² *State v. Powers*, 51 N. J. L. 432; 17 Atl. Rep. 969; *Ewing v. Bailey*, 36 Ill. App. 191; *Hroneck v. People* (Ill., 1890), 24 N. E. Rep. 861. In enunciating the rule at common law, *Shaw, C. J.*, said in *Com. v. Smith*, 2 Gray, 516: "The want of such religious belief must be established by other means than the examination of the witness upon the stand."

Evans v. Hettich, 7 Wheat. 453, 470.

⁴ *Reg. v. Hill*, 15 Jur. 470; 5 Eng. L. & Eq. 547; 5 Cox's C. C. 259, 266; *Holcomb v. Holcomb*, 28 Conn. 177; *District v. Armes*, 107 U. S. 521; *Coleman v. Com.*, 25 Gratt. 865; *Worthington v. Mencer* (Ala., 1892), 11 S. Rep. 72.

⁵ *Walker v. State* (Ala., 1893), 12 S. Rep. 83.

⁶ *Dickson v. Waldron* (Ind., 1893), 35 N. E. Rep. 1.

³ 1 Greenl. on Ev., § 365; *White's Case*, 2 Leach's Cr. Cas. 430; *Rosc.*

sane, and in case evidence of his insanity is offered when his deposition is read in court, the question of his mental capacity is then for the jury.¹ Where the witness, though he has been legally pronounced insane and is in charge of a committee, has been permitted by the court to testify as a competent witness, his credibility is a question for the jury.² If his evidence is uncorroborated, and where, being a party, he is interested in the suit, the jury may refuse to believe his testimony if upon his whole evidence and his actions while on the stand they believe his mind is so far diseased that his evidence is unreliable and incredible.³

§ 318. **Deaf-mutes as witnesses.**—By the earlier common law a deaf-mute was regarded as an idiot,⁴ and deemed to be so utterly devoid of understanding that he was incompetent to testify as a witness until it was clearly and affirmatively shown that he possessed sufficient intelligence for that purpose,⁵ and the burden of proving him competent was on the party producing him. At the present day, if he can read and write, he may be questioned and may reply in writing,⁶ though ordinarily, even if he can write, his examination may be conducted by the use of signs with the aid of an interpreter who is properly qualified.⁷ Expert testimony is not required to show the intelligence of a deaf and dumb witness where his employer or some other person acquainted with him testifies to his intelligence and to his knowledge of the sign language.⁸

§ 319. **Children as witnesses.**—Until the contrary is shown, it is a presumption that after a child has attained the age of

¹ *Gainesworth v. Caldwell*, 81 Ga. 76. *Cf. contra*, where a witness is examined in court, *Clements v. McGinn* (Cal., 1893), 33 Pac. Rep. 920.

² *People ex rel. Norton v. N. Y. Hospital*, 3 Abb. N. C. 229.

³ *Worthington v. Mencer* (Ala., 1892), 11 S. Rep. 72.

⁴ 4 Bl. Com. 303-4.

⁵ 1 Greenl. on Ev., § 366.

⁶ *Morrison v. Leonard*, 3 C. & P. 127. "A witness, unable to speak or hear, is not incompetent, but may give his evidence by writing or by signs, or in any other manner in

which he can make it intelligible, but such writing must be written and such signs made in open court. Evidence so given is deemed to be oral evidence." *Stephen's Digest*, art. 106.

⁷ *Skaggs v. State*, 108 Ind. 53; *Com. v. Hill*, 14 Mass. 207; *Ruston's Case*, 1 Leach's Cr. Cas. 408; *State v. Wolf*, 8 Conn. 93; *State v. Howard* (Mo., 1893), 24 S. W. Rep. 81; *Snyder v. Nations*, 5 Blackf. 295.

⁸ *State v. Weldon* (S. C., 1893), 17 S. E. Rep. 688.

fourteen he possesses sufficient intelligence to testify as a witness. In the case of a child under that age his competency must be shown.¹ It matters not how young he may be, he will be competent if he possesses enough mental capacity and memory to enable him to give a reasonably intelligent account of the transaction he is called upon to describe, and understands the character, effect and obligation of an oath.² Where the child does not fully understand the nature and obligation of an oath, the court may, in its discretion, where the witness has sufficient mental capacity to profit by such teaching, allow him to be more fully instructed by a proper person.³ The competency of a child under fourteen is always a question for the discretion of the court, and unless this discretion is grossly abused, its exercise is not reviewable on appeal.⁴

§ 320. Witnesses rendered incompetent by conviction of infamous crimes — The effect of pardon.— At common law persons who had been convicted of perjury, murder, piracy, forgery, arson or other infamous crimes were thereby rendered incompetent to testify as witnesses. A delinquency of this character was conclusively presumed to indicate such a state of moral turpitude on the part of the person who had been convicted that his absolute incapacity to tell the truth was taken for granted. In other words, the probability that

¹ *Hughes v. Detroit*, 31 N. W. Rep. 603; 63 Mich. 10.

² *Davis v. State* (Neb., 1890), 47 N. W. Rep. 854; *State v. McGuff*, 88 Ala. 151; *McGuire v. People*, 44 Mich. 286; *Jones v. Brooklyn, etc. Co.*, 3 N. Y. S. 253; *State v. Severson*, 43 N. W. Rep. 533; *Holst v. State*, 23 Tex. App. 1; *Moore v. State*, 79 Ga. 498. But the dying declaration of a child four years old has been rejected upon the presumption that one so young could not realize the idea of a future state. *Rex v. Pike*, 3 C. & P. 598; *People v. McNair*, 21 Wend. 608; *State v. Michael*, 37 W. Va. 565. In *Agnew v. Brooklyn City R. R. Co.*, 5 N. Y. S. 756, a child only six and a half years of age, who stated that she knew she

would be punished if she did not tell the truth, was held competent as a witness.

³ *Rex v. Wade*, 1 Mood. Cr. Cas. 86; *Com. v. Lynes*, 142 Mass. 570-580. *Contra*, *Rex v. Williams*, 7 P. & P. 320. *Cf.* *Reg. v. Nicholas*, 2 C. & K. 246; *Taylor v. State* (Tex., 1887), 3 S. W. Rep. 753.

⁴ *Ridenhour v. Kansas City*, 102 Mo. 270; *People v. Frindel*, 58 Hun, 482; *Hawkins v. State*, 27 Tex. App. 273; *State v. Severson* (Iowa, 1889), 43 N. W. Rep. 533. Leading questions are never objectionable when put to a youthful witness to ascertain his competency and understanding of an oath. *Hodge v. State* (Fla., 1890), 7 S. Rep. 593.

a person convicted of an infamous crime would commit perjury if allowed to testify as a witness was so great that the interest of truth and justice demanded his exclusion from the witness stand.¹ The common law required that the witness should have been convicted of an *infamous crime*, and the early writers usually classified under this head treason, felony and the *crimen falsi*.²

So far as treason is concerned, and that very numerous class of offenses which in England, until the beginning of the present century, constituted felony at common law, but little uncertainty was experienced. A conviction of perjury,³ forgery,⁴ or conspiracy to suppress testimony or to obstruct justice,⁵ was always sufficient to exclude the person convicted from the witness stand. On the other hand, under the term *crimen falsi* was rather loosely grouped those minor offenses, such as criminal libel, barratry, maintenance and the like, which, while not amounting to felony at common law, indicate an inherent lack of respect for truth, or a deliberate intention to interfere with and obstruct the administration of justice, or to employ the machinery of the law for improper ends by the person perpetrating such crimes.⁶

As between third parties the witness was absolutely incompetent,⁷ and the admission of his evidence was adequate ground for a new trial. But it seems that his affidavit under certain circumstances was receivable as to collateral points not involved in the main issue, as, for example, on a motion to set aside a judgment which had been irregularly rendered.⁸ The incompetency caused by infamy is removable at common law by the pardon of the witness,⁹ by the reversal of the judgment

¹ 1 Greenl. on Ev., § 372. The conviction of the witness could only be proved by the record as at present (*Rex v. Castell Careinion*, 8 East), and the judgment must have been rendered by a court having jurisdiction. *Cooke v. Maxwell*, 2 Stark. 183. So if he has been convicted merely, but not sentenced, it seems he is still competent. *Brown v. Orr*, 86 Va. 935.

² 6 Com. Dig. 353, Testmoigne, A. 4, 5; Co. Lit. 6b; 2 Hale, P. C. 277.

³ Co. Lit. 6b.

⁴ *Rex v. Davis*, 6 Mod. 74.

⁵ *Bushel v. Barrett*, Ry. & M. 434.

⁶ 2 Russ. on Crimes, 592; 1 Greenl. on Ev., § 375. In *Butler v. Wentworth*, 84 Me. 25, an infamous crime, for which no one can be held unless indicted, has been defined as one that is punishable by more than one year's imprisonment.

⁷ In re Sawyer, 2 Q. B. 721.

⁸ 1 Greenl. on Ev., § 374.

⁹ *Boyd v. United States*, 142 U. S.

against him, or by his enduring the punishment of imprisonment or transportation annexed to the crime of which he had been convicted. When, however, a statute in expressly prescribing the punishment which is to be inflicted for the commission of a crime, provides also that the person convicted thereunder shall forever be incompetent as a witness in any court, a pardon is ineffectual to restore his competency.¹ A witness who is infamous is not rendered competent by a pardon which merely "remits the residue of the punishment he was to endure,"² or which is subject to revocation by the pardoning power in case he shall again be convicted.³ But a full pardon is not rendered ineffectual because it was granted for the express purpose of rendering a witness competent to testify in a case then pending in a court under the jurisdiction of the pardoning power, and in which the state is the prosecutor.⁴ The incompetency caused by a conviction of crime is not regarded as an essential part of the punishment, nor is

450; *Logan v. United States*, 144 id. 263; *Puryear v. Com.*, 83 Va. 51; *Martin v. State*, 21 Tex. App. 1; *United States v. Hall* (D. C.), 53 Fed. Rep. 352; *State v. Dodson*, 16 S. C. 453; *Rivers v. State*, 10 Tex. App. 177; *Hester v. Com.*, 85 Pa. St. 139; *Jones v. Harris*, 1 Strobh. (S. C.) 160. See, also, *Com. v. Bush*, 2 Duv. (Ky.) 264; *State v. Foley*, 15 Nev. 64.

¹ *Rex v. Ford*, 2 Salk. 690; *Blane v. Rogers*, 49 Cal. 15; 2 Russell on Crimes, 595, 596; Bull. N. P. 292. It is provided in several states that a person convicted of perjury is not rendered competent as a witness by his pardon. Virginia, Code, 3898; Florida, Thomp. Dig. 344; West Virginia, Code, ch. 152, § 17.

² *Perkins v. Stevens*, 24 Pick. (Mass.) 277.

³ *McGee v. State*, 16 S. W. Rep. 422; 29 Tex. App. 596.

⁴ *Boyd v. United States*, 142 U. S. 450. Parol evidence is admissible to show that a pardon covered the crime of which witness was guilty

(*Martin v. State*, 21 Tex. App. 1), or to identify the person named in it (*State v. Rose*, 92 Mo. 201). The court is bound to take judicial notice of a general amnesty or legislative pardoning act (*State v. Blalock*, Phill. (N. C.) 242), but an executive pardon of a particular individual, being in its nature a private deed or release, must be proved, usually by the production in court of the instrument itself. *United States v. Wilson*, 7 Pet. (U. S.) 150; *State v. Babbiste*, 26 La. Ann. 134; *Rosson v. Stehr*, 23 Tex. App. 287; *Spalding v. Saxton*, 6 Watts (Pa.), 338. An absolute pardon once delivered and accepted is irrevocable (*Rosson v. Stehr*, 23 Tex. App. 287), while if the performance of some act by the witness is required before the pardon becomes operative to restore his competency, it will be necessary to show that the condition has been performed. *Waring v. United States*, 7 Ct. Cl. 501; *Scott v. United States*, 8 id. 457; *State v. Keith*, 63 N. C. 140.

the conviction effective to disqualify the person beyond the territorial limits of the jurisdiction wherein judgment was rendered against him. A witness convicted in one state is not incompetent to testify in the courts of a sister state, though under a statute of the latter state persons convicted of crime are incompetent.¹

§ 321. Statutory regulation of the competency of witnesses convicted of crime.—The common-law incompetency of persons convicted of crime is generally abolished by statutes in the United States. In many of the states the fact that a witness has been convicted of any crime, however that crime may imply or indicate his utter lack of respect for truth, is no objection to his competency, though it is allowable to show his conviction by proper evidence to enable the jury to estimate his moral character as a man and his credibility as a witness.²

In some states a conviction of certain crimes, as perjury, the commission of which involves an utter disregard of the obligation or sanctity of an oath, is still an insuperable objection to the competency of a witness.³ In some few of the states of the Union a witness who has been convicted of a capital crime or of certain specified felonies which involve or indicate a high degree of moral turpitude, such, for example,

¹ *Logan v. United States*, 144 U. S. 263. *Contra*, *Peltier v. State*, 23 Tex. App. 366; *Sims v. Sims*, 75 N. Y. 466.

² This is the statute law in New York (Code Civ. Pro. 831), Rhode Island (Pub. St., ch. 214, § 38), Utah (Compiled Laws 1888, vol. 2, tit. 10, ch. 2), Colorado (Gen. Laws, § 3647), California (Civil Code, § 1879), Connecticut (Gen. Stat., § 1098), Indiana (R. S., 1888, §§ 506, 1798), Georgia (Code, § 3854), Michigan (Howell's Ann. Stat., §§ 7543, 7544), Illinois (R. S., ch. 51, § 1), Massachusetts (Pub. Stat., ch. 169, § 19), Minnesota (Statutes, § 5095), New Hampshire (Pub. St. 1891, ch. 223, § 26), Ohio (R. S. 1886, §§ 5240, 7284), Iowa (Rev. Code 1896, § 3637), Maine (R. S. 1883,

ch. 82, § 105), Missouri (R. S. 1889, § 8925), Wisconsin (R. S. 1878, sec. 4073), Delaware (Laws, vol. 17, ch. 598, § 3), Kansas (Gen. Stat. 1889, § 4414), Nebraska (Code, p. 672, § 330), Nevada (Gen. St. 1885, § 3399, sec. 377), Montana (Code Civ. Proc. 647) and Oregon (Hill's Ann. Laws 1887, ch. 8, title 3, § 710).

³ This is the law in Alabama (Code 1886, § 2766), Florida (Laws, ch. 202, § 6), Maryland (Pub. Gen. Laws, art. 35, § 1), Mississippi (Rev. Code 1880, § 1600), Pennsylvania (Laws 1887, ch. 89, § 2), Vermont (R. L. 1880, § 1008) and Washington (Code, vol. 2, § 1647). The statutes cited in this and the preceding note are stated in full in 1 Greenleaf, note to § 372.

as burglary, forgery, counterfeiting, rape, arson, perjury, bigamy, sodomy, etc., is by statute rendered absolutely incompetent to testify.¹

§ 322. **Statutes construed.**— Where the conviction of a witness of crime is no longer any objection to his competency the party in whose behalf he is called to testify may introduce evidence of his reputation for truthfulness if his credibility is impeached by proof of his previous conviction.² In such a case the character of the witness for truthfulness is considered to be put in issue by evidence from which the jury is permitted to draw the inference that the witness has committed perjury because he has been guilty of some other crime of perhaps a totally dissimilar character. In other words, the witness, having been shown to be of a depraved character in one particular, may be equally deficient in moral qualities in other directions. The conviction must, in the absence of statute, be shown by the record;³ and if an appeal therefrom is pending when the witness is examined, evidence of the conviction is inadmissible to impeach his evidence.⁴

Upon the question whether, under the existing statutes, the conviction of a witness for any crime which would not have rendered him incompetent at common law may be shown for the purpose of impeaching his credit, the cases are divided. Much of course depends upon the express terms of the statute. On the one hand, it has been held that the witness may be discredited by showing him to have been guilty of a mis-

¹ Arkansas (Code, § 2859), Tennessee (Code, § 4562), Texas (Code Cr. Pro. 730), Virginia (Code 1887, § 3898). See last note. See, also, *Com. v. McGuire*, 84 Ky. 57. These statutes are to be strictly construed and the crimes mentioned in them will be presumed to be crimes at common law. *Williams v. Dickenson*, 28 Fla. 90; *Com. v. Minor*, 89 Ky. 555; 13 S. W. Rep. 5. Nor should these statutes be so construed as to prevent one accused of crime from testifying in his own behalf (*Ranson v. State*, 40 Ark. 176; *Ray-*

land v. State, 2 Pickle (Tenn.), 472), if he elects to do so.

² *Webb v. State*, 29 Ohio St. 351; *Com. v. Ford*, 146 Mass. 131; *Gertz v. Fitchburg*, 137 Mass. 77.

³ *Com. v. Gorham*, 99 Mass. 420; *Hilts v. Colvin*, 14 Johns. 182; *Pullen v. Pullen*, 43 N. J. Eq. 139. *Contra* by statute, *Spiegel v. Hays*, 118 N. Y. 660; *Com. v. Sullivan*, 150 Mass. 315; *State v. Miller*, 100 Mo. 606; *People v. Rodrigo*, 69 Cal. 601; *State v. Adamson*, 43 Minn. 196.

⁴ *Jones v. State* (Tex., 1893), 22 S. W. Rep. 404; *Card v. Foot*, 57 Conn. 431. See § 354.

demeanor,¹ though where a statute expressly provides that the witness may be interrogated as regards a "conviction of felony," proof of a misdemeanor is inadmissible.² The current of the decisions, however, supports the contrary view, that a conviction for those infamous crimes only can be proved which would have destroyed his competency at common law.³ Where a statute removes the common-law disability arising from infamy, the confession by a witness that he has perjured himself in the same matter to which he now testifies constitutes no objection to his competency.⁴

§ 323. **Accomplices.**—At common law an accomplice was competent as a witness for or against the accused, even though jointly indicted with him, provided he was not himself actually a party to the record.⁵ If they are jointly tried and the evidence against either is insufficient to convict, he may be acquitted and discharged and be called to testify as a witness.⁶

¹ *State v. Pfefferlee*, 36 Kan. 90; *Fischer v. Insurance Co.*, 33 Fed. Rep. 544; *Quigley v. Turner*, 150 Mass. 108; *Com. v. Ford*, 146 Mass. 181; 15 N. E. Rep. 153; *Helm v. State* (Miss., 1890), 7 S. Rep. 487.

² *Hanners v. McClelland*, 74 Iowa, 318.

³ *Bennett v. State*, 24 Tex. App. 73; *Bartholomew v. People*, 104 Ill. 601; *Card v. Foot*, 57 Conn. 431; *Coble v. State*, 31 Ohio St. 100; *Com. v. Dance*, 8 Cush. 384; *Reddick v. State*, 21 Tex. App. 267; *People v. Carolan*, 71 Cal. 195.

⁴ *People v. O'Neil*, 109 N. Y. 251. In *United States v. Gates*, 6 Fed. Rep. 866, the court said: "In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its nature, purpose and effect, are looked at in determining whether it is infamous or not."

⁵ As to presumptions respecting accomplices, see § 226.

⁶ See *ante*, § 305. One who, solely

for the purpose of discovering and procuring the punishment of criminals, communicates with and aids them without a criminal intent, is not an accomplice. *People v. Smith*, 94 N. Y. 649; *People v. Molins*, 10 N. Y. S. 130; *State v. McKean*, 36 Iowa, 343; *Com. v. Downing*, 4 Gray (Mass.), 29; *Com. v. Baker*, 29 N. E. Rep. 512; 155 Mass. 287; *Com. v. Willard*, 22 Pick. 476; *Campbell v. Com.*, 84 Pa. St. 187; *Harrington v. State*, 36 Ala. 236; *State v. Brownlee* (Iowa, 1892), 51 N. W. Rep. 25. Whether an accomplice shall be permitted to turn "state's evidence," and when he does so, whether he is entitled to exemption from future prosecution on that account, are wholly discretionary with the public prosecutor. *State v. Runnels*, 28 Ark. 121. Mere knowledge that an offense is being or has been committed does not render a party possessing such knowledge an accomplice. *Alford v. State*, 31 Tex. Crim. Rep. 299; *State v. Umble* (Mo., 1893),

But accomplices jointly indicted are not competent witnesses for each other while the indictment is pending, though they may be tried separately. They do not become competent for each other until the defendant who is to testify as a witness has his name taken from the record by a *nolle prosequi* or an acquittal.¹ When the defendants are separately indicted they are of course competent for each other.² So where the common-law disability of convicted criminals has been abrogated by statute, or where it is removed by pardon or otherwise, no valid reason is conceived to exist against the admission of the testimony of a convicted accomplice upon the trial of another person who may have been implicated with him in the commission of crime.³ Where several are jointly tried it is competent for the court to order the entering of a *nolle prosequi* or to accept a plea of guilty on a promise of immunity or to order an acquittal for the express purpose of enabling an accomplice to testify for the prosecution.⁴

The admission of the testimony of accomplices who are under indictment as witnesses for the prosecution is said, however, to be largely in the discretion of the court.⁵ The question is usually not only can the prisoner be convicted if the accomplice does not testify, but can he be convicted if he does testify. If, on the one hand, sufficient evidence has been given upon which the jury may convict the accused without receiving that of the accomplice, or if, on the other, the evidence which was offered is so weak and conflicting that even with his testimony no reasonable probability arises that a

22 S. W. Rep. 378; *People v. McGonegal*, 136 N. Y. 62; *Elizando v. State*, 31 Tex. Crim. Rep. 237; *People v. McGuire*, 135 N. Y. 639.

¹ *Noyes v. State*, 40 N. J. L. 429; *State v. Barrows*, 76 Me. 401; *Carroll v. State*, 5 Neb. 31; *Allen v. State*, 10 Ohio St. 287; *McKenzie v. State*, 24 Ark. 636.

² *United States v. Hunter*, 1 Cranch, 446; *Lucre v. State*, 7 Baxter (Tenn.), 148.

³ *Taylor v. People*, 12 Hun, 212; *Rex v. Westbeer*, 1 Leach, 14; *Rex v. Fletcher*, 1 Stra. 633; *Wisdom v.*

State, 11 Colo. 170; *Townsend v. Bush*, 1 Conn. 267; *State v. Walker* (Mo., 1888), 9 S. W. Rep. 646; *Musson v. Fales*, 16 Mass. 335; *Churchill v. Suter*, 4 id. 162.

⁴ *State v. Graham*, 41 N. J. L. 15; *Lindsay v. People*, 63 N. Y. 143; *State v. Lyon*, 81 N. C. 600; *United States v. Ford*, 9 Otto (U. S.), 594; *State v. Steifel*, 106 Mo. 129; *Oliver v. Com.*, 77 Va. 590. See *ante*, § 305.

⁵ *People v. Whipple*, 9 Cowen, 707; *Com. v. Brown*, 130 Mass. 279; *Runnels v. State*, 28 Ark. 121.

conviction will result, the court may reject him as a witness.¹ An accomplice who voluntarily confesses his own guilt and offers to testify against his criminal associates cannot demand as of right any exemption from a prosecution for his own crime.² But such a witness whose evidence has aided materially in the conviction of another criminal certainly has a strong moral claim to clemency, and, if he is subsequently convicted of that crime, his moral claim should be recognized by the pardoning power under such circumstances; and, particularly if his testimony was procured by a promise of immunity, or during interviews with the public prosecutor, principles of justice demand and the prevalent practice would sanction the judicial recommendation of his case to the executive in order that his pardon may be obtained.³ But the voluntary confession of an accomplice made under a promise of immunity may be used against him on his subsequent trial where he refuses subsequently thereto to testify against his associates in crime.⁴ In consequence of the doubtful character of the evidence of an accomplice, the law not only permits but encourages his liberal and exhaustive cross-examination for the

¹ *Rex v. Mellor*, Staff Sum. Ass'n, 1833; *State v. Pratt*, 98 Mo. 482; *Reg. v. Sparks*, 1 F. & F. 388; *Ray v. State*, 1 Greene (Iowa), 316; *Wight v. Rindskopf*, 43 Wis. 344.

² *United States v. Ford*, 99 U. S. 594; *United States v. Hinz*, 35 Fed. Rep. 723; *Long v. State*, 86 Ala. 36.

³ *State v. Graham*, 41 N. J. L. 15; *State v. Lyon*, 81 N. C. 600; *Neely v. State*, 27 Tex. App. 324. *Cf. Reg. v. Garside*, 2 Lew. C. C. 38; *Long v. State*, 86 Ala. 36. "Accomplices not convicted of an infamous crime when separately tried are competent witnesses for or against each other. The universal usage is that such a party, if called and examined by the state on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that

he testified fully and fairly. But it is equally clear that he cannot plead such fact in bar of an indictment against him, nor avail himself of it upon his trial; for it is merely an equitable title to the mercy of the executive, subject to the conditions stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose." *United States v. Ford*, 99 U. S. 595.

⁴ *United States v. Hinz*, 35 Fed. Rep. 272; *State v. Condry*, 5 Jones' L. (N. C.) 418; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Runnels v. State*, 28 Ark. 121; *Wight v. Rindskopf*, 43 Wis. 349; *Neely v. State*, 27 Tex. App. 324; *Alderman v. People*, 4 Mich. 411; *Rex v. Gillis*, 11 Cox C. C. 69. See *ante*, § —, Confessions.

purpose of testing the credit due him while on the witness stand.¹

§ 324. **Corroboration of accomplices.**—While no presumption of law exists against the credibility of the evidence of an accomplice so that a conviction may be had upon his uncorroborated evidence alone,² the jury is usually instructed or advised that the utmost caution should be employed in the reception and consideration of accomplice evidence, or that it should be submitted to the strictest scrutiny.³ Accordingly juries are generally advised that they may acquit the accused if the evidence of the accomplice is not corroborated, though a failure to so instruct is not ground for a new trial.⁴

¹Com. v. Price, 10 Gray (Mass.), 472; Lee v. State, 21 Ohio St. 151; Marler v. State, 67 Ala. 55; Hamilton v. People, 29 Mich. 173. Cf. Craft v. Com., 81 Ky. 349. Whether a witness is an accomplice has been held to be a question for the jury. People v. Bollinger, 71 Cal. 17. The defense may show that an accomplice testifying for the state does so with the expectation of gain or immunity, and it is immaterial whether there has been any actual agreement to that effect with the public prosecuting officer or not. Allen v. State, 10 Ohio St. 287; People v. Langtree, 64 Cal. 256; Tullis v. State, 30 Ohio St. 200; United States v. Hinz, 35 Fed. Rep. 272. The jury need not be convinced that he is an accomplice beyond a reasonable doubt. Com. v. Ford, 111 Mass. 394.

²Bacon v. State, 22 Fla. 51; Porter v. State, 76 Ga. 658; State v. Prater, 26 S. C. 198; 2 S. E. Rep. 108; State v. Hawkins, 100 Mo. 666; Wisdom v. State, 11 Colo. 170; State v. Jackson, 106 Mo. 174; Rountree v. State, 88 Ga. 457; State v. Dana, 10 Atl. Rep. 727; 59 Vt. 614; State v. Miller, 97 N. C. 484; People v. Gallagher, 75 Mich. 512; People v. O'Brien, 60 Mich. 8. See, also, *ante*, § 226.

³See *ante*, Presumptions of Fact, Accomplices, § 226. "When the only proof against a person charged with a criminal offense is the evidence of an accomplice uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence though they have a legal right to do so." Stephen's Dig. Ev., art. 121.

⁴State v. Potter, 42 Vt. 495; State v. Litchfield, 58 Me. 267; Ingalls v. State, 48 Wis. 647; State v. Miller, 97 N. C. 484; Carroll v. Com., 84 Pa. St. 107. See generally upon the corroboration of accomplices, Sumpter v. State, 11 Fla. 247; State v. Holland, 83 N. C. 624; Tisdale v. State, 17 Tex. App. 444; Lumpkin v. State, 68 Ala. 53; State v. Dana, 59 Vt. 614; 10 Atl. Rep. 727; Craft v. Com., 80 Ky. 349; White v. State, 52 Miss. 216; Cheatham v. State (Miss., 1890), 7 S. Rep. 294; State v. Prater, 26 S. C. 198; 2 S. E. Rep. 108; Ulmer v. State, 14 Ind. 52; Powers v. State, 44 Ga. 209; State v. Bayonne, 23 La. Ann. 78; State v. Williamson, 42 Conn. 261; Smith v. State, 28 Tex. App. 309; Earl v. People, 73 Ill. 329; State v. Watson, 31 Mo. 361; State v. Litchfield, 58 Me. 267; Com. v.

The credibility of the testimony of an accomplice and the necessity for evidence corroborative of it before a conviction can be had are involved in some confusion. The proposition that an accused person may be convicted on the evidence of an accomplice alone, and that the testimony of such a witness should be corroborated, are both sound, though they involve a seeming inconsistency. The proposition that an accomplice must be corroborated is not equivalent to the proposition that there must be cumulative testimony from some other witness to the same facts to which he has testified. "If the testimony of the accomplice, *his manner of testifying, his appearance upon the witness stand*, impress the jury with the truth of his statement, there is no inflexible rule of law which prevents a conviction,"¹ provided, of course, the jury believe that the evidence of the accomplice tends to connect the accused with the crime charged.²

The character and degree of corroboration required may, to a certain extent, be measured by the enormity of the crime alleged, the moral perversity involved in its commission and the punishment which may be inflicted,³ so that conviction of a misdemeanor might be sustained without the production of independent corroborative evidence before the jury where such evidence would be required in the case of a felony.⁴ The corroboration of the evidence of an accomplice need not extend to every material fact.⁵ If, however, independent corroboration by other witnesses is required in any case, it must refer to that portion of the testimony of the accomplice which is material to the guilt of the prisoner. The corroborative evidence must tend to prove the guilt of the accused by connecting him with the crime committed, for it is of no importance whatever to corroborate the accomplice on irrelevant or immaterial details, or to show that he has not perjured himself

Snow, 111 Mass. 411; State v. Moran, 34 Iowa, 453.

¹ Cox v. Com., 125 Pa. St. 103; Collins v. People, 98 Ill. 584.

² See United States v. Reeves, 38 Fed. Rep. 404.

³ Bell v. State, 73 Ga. 572; Rex v. Jarvis, 2 M. & R. 40.

⁴ Reg. v. Farler, 8 C. & P. 106;

Reg. v. Young, 19 Cox C. C. 371; McClory v. Wright, 10 Ir. Law, 514; Rountree v. State, 88 Ga. 457.

⁵ State v. Allen, 57 Iowa, 451; State v. Hennessy, 55 id. 299; United States v. Howell, 56 Fed. Rep. 21; People v. Elliott, 106 N. Y. 288; Lumpkin v. State, 68 Ala. 56.

in stating matters not pertinent to the issue on trial and upon which he had no interest to testify falsely. The corroboration must bear directly or indirectly, not upon his general character for truthfulness, but upon the question whether, in this particular case and upon the facts involved, his testimony is reliable and worthy of credit by the jury in determining the guilt or innocence of the prisoner.¹

The rule of the common law requiring the testimony of an accomplice to be corroborated under certain circumstances has been confirmed by statutes in some of the states. Thus, in New York, "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect defendant with the commission of the crime."² The confession of the accused is competent as corroborative evidence of the testimony of an accomplice.³ Whether the testimony of an accomplice is corroborated so that the guilt of the prisoner is proved beyond a reasonable doubt is a question for the jury to decide.⁴ But whether the evidence of the accomplice shall go to the jury is a distinct question for the court. If corroborative circumstances are proved from which, with the evidence of the accomplice, reasonable men may infer the existence of the guilt

¹ *Com. v. Bosworth*, 22 Pick. 397, 399; *Com. v. Holmes*, 127 Mass. 424; *State v. Jackson*, 106 Mo. 174; *Martler v. State*, 67 Ala. 55; *State v. Allen*, 57 Iowa, 431; *United States v. Ybanez*, 53 Fed. Rep. 536; *Com. v. Holmes*, 127 Mass. 424; *Cohen v. State*, 11 Tex. App. 622; *People v. Clough*, 73 Cal. 348; 15 Pac. Rep. 5; *Kilrow v. Com.*, 89 Pa. St. 480; *Coleman v. State*, 44 Tex. 109; *People v. Elliott*, 106 N. Y. 288; *People v. Ogle*, 104 id. 511; *Watson v. Com.*, 95 Pa. St. 418; *People v. Everhardt*, 104 N. Y. 591; *Com. v. Drake*, 124 Mass. 21; *State v. Kellerman*, 13 Kan. 135; *State v. Thornburg*, 26 Iowa, 80; *State v. Walker* (Mo., 1888), 9 S. W. Rep. 646; *Crowell v. State*, 24 Tex. App. 204; *State v. Banks*, 40 La. Ann. 736; *People v.*

Grindell, 15 Col. 301; *Com. v. Chase*, 147 Mass. 597.

² *People v. Everhardt*, 104 N. Y. 594; *People v. Ogle*, 104 id. 515; *People v. Smith* (Cal., 1893), 33 Pac. Rep. 58; *People v. O'Neill*, 109 N. Y. 251; *People v. Elliott*, 106 N. Y. 288; *Bowling Green v. Com.*, 79 Ky. 604; *State v. Godell*, 8 Oreg. 30; *People v. Clough*, 73 Cal. 348; *People v. Ryland*, 28 Hun, 568; *People v. O'Neill*, 48 id. 36; *Middleton v. State*, 52 Ga. 527; *Lumpkin v. State*, 68 Ala. 56; *Burney v. State*, 87 Ala. 80; *Myers v. State*, 7 Tex. App. 640. See, also, *McCalla v. State*, 66 Ga. 346; *State v. Hyer*, 39 N. J. L. 598; *People v. Courtney*, 28 Hun, 589.

³ *Partee v. State*, 67 Ga. 570.

⁴ *Com. v. Holmes*, 127 Mass. 424; *People v. Everhardt*, 104 N. Y. 591.

of the accused, the court is justified in submitting the evidence of the accomplice to the jury under such a statute.¹ Corroboration by evidence independent of accomplice evidence is not dispensed with where several accomplices are produced as witnesses against a prisoner. The accomplices are not deemed to corroborate each other.²

¹ *People v. Jaehne*, 7 N. E. Rep. 290 (N. Y., 1889). That an accomplice is testifying under an express agreement of immunity is an objection to his credibility alone. *Black v. State*, 59 Wis. 471; *Olive v. State*, 11 Neb. 1.

² *Rex v. Noakes*, 5 C. & P. 326;

Whitlow v. State (Tex., 1893), 13 S. W. Rep. 865; *United States v. Hinz*, 32 Fed. Rep. 273; *People v. O'Neill*, 109 N. Y. 251; *State v. Williamson*, 42 Conn. 261. But a failure to charge the jury to this effect is not reversible error. *McConnell v. State* (Tex., 1893), 18 S. W. Rep. 645.

CHAPTER XXIII.

EXAMINATION OF WITNESSES.

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| <p>§ 330. Order for witnesses to withdraw from court-room.</p> <p>331. Direct examination and cross-examination distinguished.</p> <p>332. Refusal to testify, when a contempt — Employment of interpreter.</p> <p>333. Mode of conducting direct examination.</p> <p>334. Questions put by the judge or by members of the jury.</p> <p>335. Leading questions — When allowable on direct examination.</p> <p>336. Responsiveness of answers.</p> <p>337. Witness may refresh his memory by referring to a memorandum or writing.</p> | <p>§ 338. Character of the writing used to refresh memory of the witness.</p> <p>339. Cross-examination — Its purpose and value.</p> <p>340. Power of cross-examination — Its extent.</p> <p>341. Redirect examination.</p> <p>342. Recalling witnesses.</p> <p>343. Receiving evidence out of court.</p> <p>344. Taking the view by the jury.</p> <p>345. "Real evidence" — Physical examination by the jury in court — Identification.</p> <p>346. Right of the defendant in a criminal trial to confront the witnesses against him.</p> <p>346a. The accused as a witness in a criminal prosecution.</p> |
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§ 330. Order for witnesses to withdraw from court-room.

The presiding judge may, when he considers it necessary to a proper administration of justice, order the exclusion of all other witnesses from the room during the examination of a witness. The order, though not perhaps of right,¹ is seldom refused where it is at all evident that the ascertainment of

¹ *Vance v. State* (Ark., 1892), 19 S. W. Rep. 1066; *State v. Fitzsimons*, 30 Mo. 236; *Riley v. State*, 88 Ala. 93; *State v. Davis*, 48 Kan. 1; *Benaway v. Conyne*, 3 Chand. (Wis.) 214; *Barnes v. State*, 88 Ala. 204; *Kelly v. People*, 17 Colo. 130; 29 Pac. Rep. 805; *Nelson v. State*, 2 Swan (Tenn.), 237; *Binfield v. State* (Neb., 1884), 19 N. W. Rep. 607; *Errissman v. Errissman*, 25 Ill. 136; *Zoldoske v. State*, 82 Wis. 580; 53 N. W. Rep. 778; *Taylor v. Lawson*, 3 C. & P. 543; *Heath v. State*, 7 Tex. App. 464; *Com. v. Thompson* (Mass., 1893), 33 N. E. Rep. 1111; *Roberts v. Com.* (Ky., 1893), 22 S. W. Rep. 845; *Taylor v. State*, 130 Ind. 66; *Haines v. Territory*, 3 Wyo. 166.

truth will be advanced thereby.¹ If a witness stays in the court-room, though by inadvertence, after the judge has ordered the witnesses to withdraw, the court may, in its discretion, refuse to allow him to be examined,² and its action in so doing will not be reversible error unless a party's substantial rights are shown to have been prejudiced thereby.³ The rule that a witness, by thus disobeying the court, renders his testimony subject to exclusion is not universally recognized. It is manifestly unfair to deprive a party, who is not in fault, of testimony on which he relies, and on which, perhaps, his whole case is founded, because the witness, out of carelessness, obstinacy or caprice, refuses or neglects to obey the order of the court. So it has been held that the testimony of such a witness cannot be excluded, but must be received, and the jury may be instructed that they may take into consideration the fact that he remained in court in determining his credibility.⁴ The witness may be proceeded against for contempt in disobeying the order.⁵ After witnesses not under examination have been directed to withdraw, it is within the discretion of the court to permit one or more of them to remain;⁶ and an exception will always be made in the case of

¹ Thomas v. State, 29 Ga. 287; Hellems v. State, 22 Ark. 207. An expert witness may be excluded in a criminal case. Vance v. State (Ark., 1892), 19 S. W. Rep. 1066.

² Ethredge v. Hobbs, 77 Ga. 251; State v. Brookshire, 2 Ala. 303; McLeon v. State, 16 Ala. 672; Trujillo v. Territory (N. Mex., 1893), 30 Pac. Rep. 870; People v. Sam Lung, 70 Cal. 516; Hey v. Com., 32 Gratt. (Va.) 946.

³ Carlton v. Com. (Ky., 1892), 18 S. W. Rep. 535; Cook v. State, 30 Tex. App. 607; 18 S. W. Rep. 412; Lassiter v. State, 67 Ga. 739.

⁴ Roberts v. Com. (Ky., 1893), 22 S. W. Rep. 895; Hubbard v. Hubbard, 7 Oreg. 42; O'Bryan v. Allen, 95 Mo. 68; 8 S. W. Rep. 225; Boalmayer v. State, 20 S. W. Rep. 1102; 31 Tex. Crim. Rep. 473 (holding that

counsel who is also a witness cannot be excluded even where the right to have the witnesses separated is statutory); State v. Thomas, 111 Ind. 516; 13 N. E. Rep. 85; Smith v. State, 4 Lea (Tenn.), 428; Taylor v. State, 29 N. E. Rep. 415; 130 Ind. 66; State v. Ward, 61 Vt. 179; Cook v. State, 18 S. W. Rep. 412; 30 Tex. App. 607; Grant v. State, 15 S. E. Rep. 488; 89 Ga. 393; State v. Lockwood, 58 Vt. 378; Lassiter v. State, 67 Ga. 739; Sartorius v. State, 24 Miss. 602; Pleasant v. State, 15 Ark. 624; Porter v. State, 2 Ind. 435.

⁵ See cases cited *supra*.

⁶ Indianapolis Cab. Co. v. Herrman, *infra*; Riley v. State, 88 Ala. 93; Barnes v. State, 88 Ala. 204; State v. Hopkins, 50 Vt. 316; Carson v. State, 80 Ga. 170.

a party to the suit, his attorney,¹ an officer of the court,² or a juror³ who is also a witness, and he will not be required to withdraw.⁴

§ 331. Direct examination and cross-examination distinguished.—The direct examination of a witness is his first examination by the party in whose behalf he is called to testify. His cross-examination is his subsequent examination by the adverse party upon the same subject-matter to which he has testified upon his direct examination.⁵

§ 332. Refusal to testify, when a contempt—Employment of interpreter.—A witness who refuses to be sworn or to answer a relevant question without a satisfactory excuse is guilty of contempt of court. But the judicial power to punish for contempt in refusing to testify is confined to courts of record and to legislative bodies in the absence of any express statute granting it to other officials whose duty it may be to interrogate witnesses.⁶ A court may punish as a contempt the refusal of a witness to testify before a commissioner appointed by it to take depositions,⁷ or before the grand jury over which it exercises supervision,⁸ or at an examination before

¹ Everett v. Lowdham, 5 C. & P. 91.

² Kelly v. People, 17 Colo. 130; 29 Pac. Rep. 805.

³ State v. Vari (S. C., 1892), 14 S. E. Rep. 892; 35 S. C. 175.

⁴ Allen v. Com. (Ky., 1888), 9 S. W. Rep. 703; Kissam v. Forrest, 25 Wend. 651; Indianapolis Cabinet Co. v. Herrman (Ind., 1893), 34 N. E. Rep. 519. The exclusion of a party is ground for a new trial. Schneider v. Haas, 14 Oreg. 174; McIntosh v. McIntosh, 44 N. W. Rep. 592; Chandler v. Avery, 47 Hun, 9; Garmon v. State, 66 Miss. 196. The court will not, however, prohibit witnesses who have been excluded from reading newspapers which contain the evidence in the case. Com. v. Hersey, 84 Mass. 173.

⁵ Anderson's Law Dict. See *post*, § 341, as to redirect examination.

⁶ White v. Morgan Co., 119 Ind. 338; People v. Rice, 10 N. Y. S. 270; Barnes v. Reilly (Mich., 1892), 45 N. W. Rep. 1016; Brunger v. Smith, 49 Fed. Rep. 124; Bradley v. Fertilizer Co. (N. C., 1893), 17 S. E. Rep. 69; Llewellyn's Case, 13 Pa. Co. Ct. R. 126; Pittman v. Hagans (Ga., 1893), 16 S. E. Rep. 352; Enos v. Garrett, 2 Pa. Dis. Co. R. 86; Ex parte Woodworth, 29 W. L. Bul. 315 (contempt before notary).

⁷ Robb's Case, 11 Pa. Co. Ct. Rep. 442. "A justice of the peace, though he cannot commit a witness for contempt, may bind a party refusing to testify to answer an indictment for obstructing justice." Albright v. Lapp, 26 Pa. St. 101.

⁸ Ex parte Harris, 4 Utah, 5; People v. Kelly, 24 N. Y. 74; Ex parte Stice, 70 Cal. 51.

trial,¹ and it may do so as often as the witness refuses to testify.² Where the statutory right is conferred upon a witness to answer only pertinent questions, he cannot be committed for contempt in refusing to reply to a question which is not pertinent;³ and generally, where the court has not acquired proper jurisdiction of the cause, the witness who refuses to testify is not in contempt.⁴

In the absence of a statute requiring it, the employment of an interpreter where a witness is unable to speak or understand the English language is discretionary,⁵ though when a party was deprived of the testimony of a material witness by the refusal of the court to employ an interpreter, it was held good ground for a new trial.⁶ A witness may act as an interpreter for another witness,⁷ and should be sworn as such to interpret faithfully;⁸ while if he is inefficient as an interpreter his restatement or interpretation may be impeached for inaccuracy by the adverse party.⁹

§ 333. Mode of conducting the direct examination.—After the witness shall have been sworn and asked to state his name in order that his identity may be ascertained or confirmed, he is to be questioned in regard to his knowledge of the matter in issue. The jury has a right to know every fact which will aid them in estimating the credit of the witness.

¹ Fenlon v. Dempsey, 21 Abb. N. C. 291.

² Ex parte Stice, 70 Cal. 51.

³ Ex parte Zeelandaur, 71 Cal. 238; In re McKnight, 11 Mont. 126; In re Odell, 6 Dem. Sur. 344.

⁴ People v. Warner, 51 Hun. 53. As regards the power of the court to commit a witness for contempt in failing to attend, see *ante*, §§ 284, 289. A publisher of a newspaper who refuses to testify or to give the real name of the author of a libelous article may be punished for contempt, though he is himself under indictment for the libel. Pledger v. State, 77 Ga. 242.

⁵ Horn v. State (Ala., 1893), 13 S. Rep. 329; Staggs v. State, 108 Ind.

53; State v. Severson, 78 Iowa, 653; Swan v. State, 26 Tex. App. 115.

⁶ Chicago, etc. Co. v. Shenk, 131 Ill. 283; 23 N. E. Rep. 436. As to the custom of employing interpreters, see under the word "translation," Anderson's Dictionary. See, also, Amory v. Fellows, 5 Mass. 225.

⁷ Chicago, etc. Co. v. Shenk, 131 Ill. 283.

⁸ People v. Dowdigan, 67 Mich. 95.

⁹ Skaggs v. State, 108 Ind. 53; Schnier v. People, 23 Ill. 17. The assistance of one or more bystanders who are not sworn to interpret may be allowed the interpreter where he is in doubt. United States v. Gibert, 2 Sumn. 19.

He may therefore be asked to explain his motives,¹ and to state who he is, whence he comes, where he lived and other personal details of a like character.² It is not permissible, except in certain cases which will be discussed later, to ask the witness leading questions, *i. e.*, questions which by their form or character "suggest to the witness the answer which the party desires and expects him to make and leads him to make it."³ Thus, questions which take the form of a statement of fact, and suggest thereby that the witness is to deny or affirm it by replying merely "yes" or "no," may be given as examples of leading questions.

Somewhat analogous to leading questions and equally inadmissible are those which assume particular facts in issue or material thereto as proved which have not been, or certain answers to have been made to prior questions when no such answers have been given.⁴ Except as elsewhere explained, in the case of the examination of experts, it is not permissible during the direct examination to question the witness in regard to matters which are not within his personal knowledge, or to endeavor by assuming or leading questions to elicit his opinion or inference as to any matter of fact.⁵ But in certain

¹ *Brooken v. State* (Tex., 1888), 9 S. W. Rep. 735.

² *Avery v. Fitzgerald*, 7 S. W. Rep. 6.

³ 1 Greenl. Ev., § 434; *Anderson's Law Dictionary*. See, also, *Chat-tanooga, etc. Co. v. Huggins*, 89 Ga. 494; *Alabama, etc. Co. v. Hill*, 93 Ala. 514; *Hicks v. Sharp*, 89 Ga. 311; 15 S. E. Rep. 314; *Cannon v. People* (Ill., 1892), 30 N. E. Rep. 1077; *Brice v. Miller*, 35 S. C. 272, 537; *Daly v. Melendy*, 32 Neb. 852; *Clingman v. Irvine*, 40 Ill. App. 606; *Baldridge, etc. Co. v. Calrett*, 75 Tex. 628; *Spear v. Richardson*, 37 N. H. 26; *State v. Johnson*, 29 La. Ann. 717; *Wilson v. McCullough*, 23 Pa. St. 440.

⁴ *Robertson v. Craver* (Iowa, 1892), 55 N. W. Rep. 492; *Hays v. State* (Tex., 1893), 20 S. W. Rep. 361;

Davis v. Willis, 67 Hun, 650; *Thompson v. Ray* (Ga., 1893), 18 S. E. Rep. 59; *Bostie v. State*, 94 Ala. 45; *People v. Lange*, 90 Mich. 454; *Foster v. Dickerson*, 64 Vt. 233; 24 Atl. Rep. 253; *People v. Fong Ah Sing*, 70 Cal. 8; *Graham v. McReynolds*, 90 Tenn. 673.

⁵ A question in the following form has been held not to be a leading question: "You may state whether you were directed by defendant, or any one of its employees or its agents, to get off of the opposite end of this coach from the end that you did get off." *McDona'd v. Illinois Cent. R. Co.* (Iowa, 1893), 55 N. W. Rep. 102. Nor is a question leading which merely repeats what a witness has testified to. *Brice v. Miller*, 15 S. E. Rep. 272; 35 S. C. 537. See §§ 185-198.

circumstances leading questions are allowable, and it is largely a matter over which the court has control, and upon which it may exercise a sound discretion whether, upon the facts in any particular case, leading questions should be permitted to be put in the direct examination.¹ If the discretion is grossly abused to the substantial injury of either party, error will lie.² A witness may be permitted to give his testimony in a narrative form, and either party may, when he states facts which are irrelevant, stop him and move to have such facts stricken out.³

§ 334. Questions propounded by the judge or jurors.—The policy of the law requires that the triers of fact should not entertain, or at least should not manifest, any partiality during the examination of the witnesses. Where the trial is by a jury, it is not only the right but it is the duty of the judge to decide all preliminary questions of fact bearing on the competency of witnesses or of evidence, and to enable him to do so he must question the witnesses. No objection can be made so long as his questions or remarks are not aimed to elicit facts bearing materially on the issue. Accordingly the court, in ruling on the competency of the evidence offered, may state the theory and grounds on which it was offered

¹ Van Doren v. Jelliffe, 20 N. Y. S. L. 455; Van Doren v. Jelliffe, 20 636; Donnell v. James, 13 Ala. 490; N. Y. S. 1; 1 Misc. Rep. 354; Whiting v. Miss. V. I. Co., 76 Wis. 592; Ducker v. Wilson (N. C., 1893), 16 S. E. Rep. 554; McClain v. Com., 110 Pa. St. 263; Walker v. Duns- Schuster v. State, 80 Wis. 107; 49 paugh, 20 N. Y. 170; Com. v. Chaney, N. W. Rep. 30; Brassell v. State, 91 148 Mass. 8; Lander v. Lander, 5 Ala. 45; 8 S. Rep. 679; Foster v. Ir. C. L. Rep. 27; Wells v. Jackson, Dickinson, 64 Vt. 235; 24 Atl. Rep. etc. Co., 48 N. H. 491. "Questions 255; Travelers' Ins. Co. v. Shepherd, suggesting the answer which the 85 Ga. 751; Badder v. Keefer, 91 Mich. 611; 52 N. W. Rep. 60; Union person putting the question wishes Pac. Ry. Co. v. O'Brien, 46 Fed. Rep. or expects to receive, or suggesting 538; Weber Wagon Co. v. Kehl, 139 disputed facts as to which the wit- Ill. 644; 29 N. E. Rep. 714; O'Neill ness is to testify, must not, if objected v. Howe, 9 N. Y. S. 746; Walker v. to by the adverse party, be asked in Dunsbaugh, 20 N. Y. 170; Obernalte an examination in chief or a re- v. Edgar, 28 Neb. 70; 44 N. W. Rep. examination, except with the per- 82; White v. White, 82 Cal. 427.

² Northern Pac. R. R. Co. v. Charles, 51 Fed. Rep. 562; 2 C. C. A. 380.

³ Gunter v. Watson, 4 Jones' (N. C.)

and rejected, and may estimate its probable effect if it had been received, provided no language is used that will improperly bias the jury for or against either party.¹ Indeed it has been held that the active participation of the court in the examination of a witness,² even to the extent of suggesting to counsel the manner in which the questions should be properly framed,³ or warning a witness that if he answers a certain question he may have to answer another,⁴ though not a commendable practice, is not ground for a new trial unless a party is actually prejudiced thereby.⁵

A witness may very properly be questioned by the court as to his understanding of a question which has been asked him by counsel,⁶ and the court may, at any time, in order to expedite the administration of justice, peremptorily check and silence a very voluble or abusive witness,⁷ or interpose *sua sponte* and without the objection of counsel,⁸ and particularly if a party has no counsel,⁹ to exclude incompetent evidence. Sometimes, as a matter of practice, jurors are permitted to interrogate a witness, and his answers, when relevant, are not objectionable because thus informally obtained. A lengthy examination by a juror, during which the juror's mental attitude or bias towards the parties or the issue is exhibited, should not be permitted or encouraged.¹⁰

A very broad line of demarcation should be drawn and

¹ Queen Ins. Co. v. Studebaker, 117 Ind. 416; Thompson v. Ish, 99 Mo. 166; Keith v. Wells (Colo., 1890), 28 Pac. Rep. 991; State v. Milling (S. C. 1892), 14 S. E. Rep. 284; Hodge v. State (Fla., 1890), 7 S. Rep. 593.

² Robinson v. State, 82 Ga. 535; Hodge v. State (Fla., 1890), 7 S. Rep. 593; Hudson v. Hudson (Ga., 1893), 16 S. E. Rep. 349; Sanders v. Bagwell (S. C., 1893), 15 S. E. Rep. 714; Bauer v. Beall (Colo., 1889), 23 Pac. Rep. 345; O'Conner v. Ice Co., 56 N. Y. Super. Ct. 410 (witness called and examined by court over objection of counsel).

³ Metropolitan St. R. Co. v. Johnson (Ga., 1893), 18 S. E. Rep. 816. Cf. *contra*, Jefferson v. State, 80 Ga. 16.

⁴ Insurance Co. v. Slowitch, 55 N. Y. Super. Ct. 452.

⁵ See Sharp v. State, 51 Ark. 147.

⁶ State v. Mathews, 98 Mo. 125.

⁷ Robinson v. State, 82 Ga. 535; Bourden v. Bailes, 101 N. C. 612.

⁸ Durrett v. State, 62 Ala. 484; People v. Turcott, 65 Cal. 126.

⁹ McClure v. Com., 81 Ky. 448.

¹⁰ State v. Merkley (Iowa, 1888), 39 N. W. Rep. 111. Sometimes a defendant is permitted by statute to make a personal statement under oath to the jury of his defense. He is not, in such a case, a witness, nor can he be examined or cross-examined by the jurors or by counsel. The court should, of its own motion, protect him from the questioning

recognized between the competency of evidence and its credibility. The admissibility of evidence is a judicial question not within the province of the jury,¹ and no remark which is made by the judge during the examination of a witness as to his competency or the relevancy or admissibility of his evidence, or the reason for its exclusion or admission, can be urged as ground for a new trial.² But the weight and credibility of testimony are for the jury, and all judicial observations or remarks upon the credibility of a witness or the amount of weight to be given to his evidence which are made *during the examination of a witness* are improper and may be objected to.³ That the remarks were inadvertently made is immaterial if a party is substantially prejudiced by them,⁴ though it seems the error may be remedied by a prompt withdrawal or explanation of the objectionable words,⁵ or by an instruction to the jury to disregard them.⁶

and interference of counsel, or of any other person, and a neglect to do so, if objection is promptly made, will be ground for reversal. *Hankins v. State* (Fla., 1892), 10 S. Rep. 822.

¹See *ante*, §§ 11-13.

²*State v. Young*, 105 Mo. 634; *Patterson v. State*, 86 Ga. 70; *Lewis v. State* (Ga., 1893), 15 S. E. Rep. 697; *Com. v. Ward* (Mass.), 32 N. E. Rep. 663; *Arnold v. State*, 81 Wis. 278; *Butler v. State* (Ga., 1893), 16 S. E. Rep. 894; *State v. Turner*, 36 S. C. 534. In a case of homicide the witness was in the room and was repeatedly questioned as to the exact spot on which he was sitting. On his answering evasively the court said: "You must have seen a part of what was going on, didn't you?" Adding, "We all know that if anything is going on in a room it is a slight circumstance where a man sits. He may turn his chair or turn around. He is not fixed like a pillar of wood. The jury understand that perfectly well. It is a waste of time to try and enlighten them on the subject." *Held* no error. *Carthaus*

v. State, 78 Wis. 560; 47 N. W. Rep. 679.

³*Sharp v. State*, 51 Ark. 147; *State v. Raymond*, 53 N. J. L. 260; *People v. Wood*, 126 N. Y. 249; *Shepherd v. State*, 31 Neb. 389; *Brunker v. Cummins* (Ind., 1893), 32 N. E. Rep. 732; *Sterling v. Callahan*, 94 Mich. 536; *Hudson v. Hudson* (Ga., 1893), 16 S. E. Rep. 349; *State v. Jacobs*, 106 N. C. 695; *People v. Fleming*, 14 N. Y. S. 200; *People v. Wood* (N. Y., 1891), 27 N. E. Rep. 362; *Campbell v. State*, 30 Tex. App. 369; *People v. Willard*, 92 Cal. 482; *State v. Lucas* (Oreg., 1893), 33 Pac. Rep. 538; *People v. Hull*, 86 Mich. 449; *Bone v. State*, 86 Ga. 108; *Newberry v. State*, 26 Fla. 334.

⁴*Garner v. State*, 28 Fla. 113.

⁵*Johnston v. State*, 94 Ala. 35; *Reinhold v. State*, 130 Ind. 467; 30 N. E. Rep. 306; *Ryan v. State*, 83 Wis. 486; *Com. v. Ward* (Mass., 1893), 32 N. E. Rep. 693; *State v. Black*, 42 La. Ann. 861; *Wynn v. City R. R. Co.* (Ga., 1893), 17 S. E. Rep. 649.

⁶*People v. Northey*, 77 Cal. 618; *Vann v. State*, 83 Ga. 44.

§ 335. **Leading questions**—When allowable on direct examination.—The general rule rejecting leading questions as above stated is subject to several important exceptions.¹ Thus, if the witness on his direct examination manifest hostility to the party who called him by coloring his testimony to favor his opponent or by an appearance of unwillingness to answer or by attempting to conceal what he knows, he may be asked leading questions.² Leading questions may be propounded not only to an unwilling witness but to one who is forgetful as well,³ or who is very young and inexperienced,⁴ or who is ignorant of the language,⁵ or to one whose memory, while clear as to the main facts of a complicated transaction,

¹ *Hoody v. Rowell*, 17 Pick. 498. In this case the law on this point was thus stated by the chief justice: "The court have no doubt that it is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness; as when he is manifestly reluctant and hostile to the interest of the party calling him, or where he has exhausted his memory, without stating the particulars required, where it is a proper name, or other fact which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required only by a pointed or leading question. So a judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to that party. The witness may have personally concealed such bias in favor of one party to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact neces-

sary to his case. This discretionary power to vary the general rule is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case." And see *Donell v. Jones*, 13 Ala. 490.

² *State v. Tall*, 43 Minn. 278; *Meixell v. Feezor*, 43 Ill. App. 180; *Rosenthal v. Bilger* (Iowa, 1893), 53 N. W. Rep. 255; *McBride v. Wallace*, 62 Mich. 451; *State v. Bener*, 64 Me. 267; *Doran v. Mullen*, 78 Ill. 342; *Navarro v. State*, 24 Tex. App. 378, 505; *Bradshaw v. Combs*, 102 Ill. 428.

³ *Born v. Rosenow* (Wis., 1893), 54 N. W. Rep. 1089; *King v. Railroad Co.*, 26 N. Y. S. 973; *Graves v. Merchants', etc. Bank* (Iowa, 1891), 49 N. W. Rep. 65; *St. Paul F. & M. Ins. Co. v. Gothell*, 35 Neb. 351.

⁴ *Palson v. State* (Ind., 1893), 35 N. E. Rep. 907; *Proper v. State* (Wis., 1893), 53 N. W. Rep. 1035. Thus in a prosecution for committing a rape on a child the state was allowed to ask the prosecuting witness, "Do you know that boy over there?" pointing to the accused party. *Paschal v. State*, 89 Ga. 303; 15 S. E. Rep. 322.

⁵ *Navarro v. State*, 24 Tex. 378; 6 S. W. Rep. 542.

is weak and undecided as regards the minor facts, items or dates which go to compose it.¹

In that portion of the direct examination which is merely introductory, leading questions are allowed,² as where counsel are permitted, instead of asking a witness what was said, to ask him whether particular statements or communications were made in his hearing, for the purpose of contradicting another witness who had previously testified that they were not made.³ So, for the sole purpose of refreshing the memory of one's own witness, counsel may ask him on his direct examination if he did not at a prior date state certain facts which are not consistent with his present statements.⁴ So where the memory of the witness is faint, the party may question him upon unimportant and irrelevant but suggestive facts,⁵ or may ask the witness what was his uniform habit or routine of acting in connection with certain transactions,⁶ if the evidence of the unimportant fact or the business routine will suggest to the memory of the witness a relevant fact which has been forgotten by him.⁷ The witness may also be asked if he mentioned a fact which he has himself forgotten to another person, and if he replies affirmatively the other person is competent to testify to such a fact.⁸ And if a witness is questioned as to names which he has forgotten, a list of names may be read over to him for the purpose of refreshing his memory.⁹

¹ A witness who on direct examination denies all knowledge of the facts which she is called to prove, but subsequently admits she suppressed the truth, may be recalled, on motion, though the party has rested his case. Her evidence may then be regarded as newly discovered. *Rice v. Rice* (N. J., 1892), 23 Atl. Rep. 946. If a witness profess ignorance of a transaction he cannot be required to inform himself thereon for the purpose of answering a question, nor does the court err in refusing to direct him to do so. *People v. Ching*, 78 Cal. 389.

² *Paschal v. State*, 15 S. E. Rep. 522; 89 Ga. 303; *Shultz v. State*, 5 Tex. App. 390; *Lowe v. Lowe*, 40 Iowa, 220.

³ *Farmers' Mut. Fire Ins. Co. v. Bair*, 87 Pa. St. 124; *Cannon v. People* (Ill., 1892), 30 N. E. Rep. 1027; *Union Pac. Ry. Co. v. O'Brien*, 49 Fed. Rep. 538; 4 U. S. App. 221; 1 C. C. A. 354. See *post*, § 350.

⁴ *State v. Cummins*, 76 Iowa, 133; 40 N. W. Rep. 124. Cf. *Avery v. Mattice*, 9 N. Y. S. 166.

⁵ *Prentiss v. Bates*, 88 Mich. 567; *O'Hogan v. Dillon*, 76 N. Y. 170.

⁶ *People v. Oyer & T.*, 83 N. Y. 436; *Morrow v. Ostrander*, 13 Hun, 219.

⁷ *Abb. Brief on Facts*, § 393.

⁸ *Shear v. Van Dyke*, 10 Hun, 528; *Green v. Cawthorn*, 4 Dev. (N. C.) 409; *Abb. Brief on Facts*, § 397; *Whart. Crim. Ev.*, § 360.

⁹ *Aceno v. Petroni*, 1 Stark. 100.

§ 336. **Responsiveness of answers.**—The questions which are put to a witness should be neither vague nor ambiguous,¹ and his replies thereto should be responsive, stating all the facts called for, and no more, without any expression of his opinion or his conjectures.² If a witness simply adopts the answer of another witness preceding him,³ or if his answer is irresponsive so that it wholly or partially fails to convey the information which is required, it may be stricken out on motion,⁴ so far as it is irresponsive;⁵ and a refusal by the court to do so, if the objection is promptly made, would be reversible error.⁶ The court may, without abusing its discretion, instruct a witness to answer a question responsively where he persists in giving an evasive answer;⁷ and whether an answer is responsive is for the court⁸ to determine. An answer which is not only not responsive, but abusive to the adverse party or to his counsel, to such an extent that it is calculated to create prejudice in the minds of the jurors, should be stricken out on motion of the party injured, even where it was given in reply to an irrelevant question.⁹

¹ *Hill v. State* (Tenn., 1892), 19 S. W. Rep. 674; *Mann v. State*, 23 Fla. 610; *Bassett v. Shares*, 63 Conn. 39; 27 Atl. Rep. 431.

² While a witness may state all the circumstances which are necessarily involved in the answer required, he should not be allowed to go beyond this. So, where a witness was asked to state a conversation he had with a certain person, and while doing so stated that a third person who was present was crying, his answer is to that extent irresponsive. *Pence v. Waugh* (Ind., 1893), 34 N. E. Rep. 860.

³ *Eddy v. Lowry* (Tex., 1894), 24 S. W. Rep. 1076.

⁴ *Baldwin v. Walker*, 94 Ala. 314; 10 S. Rep. 891; *Colclough v. Niland*, 68 Wis. 309; *Harnickell v. Copper Mining Co.*, 5 N. Y. S. 112; *Kennedy v. Upshaw*, 66 Tex. 442; *Link v. Sheldon*, 18 N. Y. S. 815; 64 Hun, 632; *Lazard v. Mer. & Min. Co.*, (Md., 1893), 26 Atl. Rep. 797; *Bischof*

v. N. Y. El. R. Co., 18 N. Y. S. 865; *Krey v. Schlusner*, 62 Hun, 620; *Angell v. Loomis* (Mich., 1893), 55 N. W. Rep. 1008.

⁵ *Benjamin v. N. Y. El. R. Co.*, 63 Hun, 629; 17 N. Y. S. 608; *Pence v. Waugh* (Ind., 1893), 34 N. E. Rep. 860.

⁶ *Chicago, etc. Co. v. Woodward*, 47 Kan. 191. The answer thus stricken out is wholly withdrawn from the consideration of the jury, nor is it the duty of the court, in its charge, to caution them to disregard it. *State v. McGahey* (N. D., 1893), 55 N. W. Rep. 753; *Hillesum v. City of New York*, 4 N. Y. S. 506.

⁷ *State v. Farley* (Iowa, 1893), 53 N. W. Rep. 1089.

⁸ *Galveston, etc. Co. v. Wesch* (Tex., 1893), 21 S. W. Rep. 62; *Van Doren v. Jelliffe*, 20 N. Y. S. 636.

⁹ *Galveston, H. & S. A. R. Co. v. Smith* (Tex., 1894), 24 S. W. Rep. 668. In this case the plaintiff suing to recover for lost baggage replied

§ 337. **The witness may refresh his memory by referring to writings.**—The general rule is that a witness will be permitted to speak of those facts only which are within his personal knowledge and recollection.¹ He is at liberty, however, to refresh or aid his memory, if it is at fault, by consulting on the witness stand a writing or memorandum made by himself or some other person,² if, after examining it, he is able to testify from his own recollection thus renewed and revived.³ The writing thus used is not generally or necessarily evidence, and no question of its relevancy or materiality should be considered;⁴ nor need it be read to the jury,⁵ though it has been held that the jury may examine it to determine whether the recollection of the witness could be refreshed by it.⁶

The cases in which a witness will be permitted to refresh his memory from writings may be classified under two heads: *First*. If a witness, though he retains no independent recollection of the facts transcribed in the writing, remembers having made it himself or recollects having seen it before, and re-

to the defendant's counsel, "it is enough to be robbed without being insulted by a corporation that boasts of its millions and then employs men wanting in intellect and the instincts of a gentleman to defend it."

¹ Greenl. on Ev., § 436; 1 Whart. Ev., §§ 516-26.

² Flint v. Kennedy, 33 Fed. Rep. 820; Card v. Foot, 56 Conn. 369; Culver v. Scott, etc. Co., 55 N. W. Rep. 552.

³ Jenkins v. State (Fla., 1893), 12 S. Rep. 677; Morris v. Columbian Iron Works & D. D. Co. (Md., 1893), 25 Atl. Rep. 417; Third Nat. Bank v. Owen, 101 Mo. 558; Rohrig v. Pearson, 12 Colo. 127; Stavinow v. Home Ins. Co., 43 Mo. App. 513; Byrnes v. Pac. Exp. Co. (Tex., 1891), 15 S. W. Rep. 46; McCloskey v. Barr, 45 Fed. Rep. 151; Kingory v. United States, 44 Fed. Rep. 669; Weston v. Brown, 80 Neb. 609; 46 N. W. Rep. 826; Com. v. Clancy, 154 Mass. 128; 27 N. E. Rep. 1001; Finch v.

Barclay, 87 Ga. 393; Laboree v. Closterman, 35 Neb. 150; 49 N. W. Rep. 102; Watrous v. Cunningham, 71 Cal. 30. "The writing is used to aid the memory. If the witness has an independent knowledge of the facts, there is no propriety in his inspecting any note or writing." State v. Baldwin, 36 Kan. 15; Sackett v. Spencer, 29 Barb. 180. Where a witness is forgetful he may be interrogated upon irrelevant but suggestive facts to refresh his memory of the main transaction but not to impeach him. Prentiss v. Bates, 88 Mich. 567; People v. Sherman, 61 Hun, 623; 133 N. Y. 349. See § 335.

⁴ McNeely v. Duff, 50 Kan. 488; Baum v. Reay, 96 Cal. 462; 29 Pac. Rep. 117; Flood v. Mitchell, 68 N. Y. 507; Pickard v. Bryant, 52 N. W. Rep. 788; 92 Mich. 430.

⁵ Raynor v. Norton, 3 Mich. 210.

⁶ Com. v. Halley, 13 Allen, 587, by Hoar, J.

members that when he saw it he knew it to be a correct statement of those facts, he may consult it.¹ Now it is clear upon considerations elsewhere explained that *under certain circumstances* such writings, if identified by the witness as being contemporaneous and original entries, if regularly made in the course of his employment, he having a full knowledge of the facts, are admissible as independent evidence as a part of the *res gestæ*.² But where the writings do not fulfill these requirements, that is, where the writings, though contemporaneous, were not made by the witness, or where they are subsequent copies of original writings made by the witness or by another person, they are not admissible as evidence though the witness may still consult them to refresh his memory, and they should be produced in court that the opposite counsel may inspect them (without being obliged to put them in evidence) and have an opportunity to question the witness as to every fact which they contain.³

¹ 1 Greenl. on Ev., § 437; Labaree v. Closterman, 33 Neb. 150; 49 N. W. Rep. 1102; Baum v. Reay, 96 Cal. 462; 29 Pac. Rep. 117; Hartley v. Cataract, etc. Co., 19 N. Y. S. 121; Green v. Casilk, 16 Md. 556; Wagonseller v. Brown, 7 Pa. Co. Ct. Rep. 663; State v. Baldwin, 36 Kan. 1; Converse v. Hobbs, 64 N. H. 42; Hayden v. Hoxie, 27 Ill. App. 533; Ellis v. State, 25 Fla. 702; 6 S. Rep. 768; Flint v. Kennedy, 33 Fed. Rep. 820; Riordan v. Guggerty, 74 Iowa, 688; Butler v. Benson, 1 Barb. 526; Burbank v. Dennis (Cal., 1893), 35 Pac. Rep. 444; Downer v. Rowell, 24 Vt. 343; Costello v. Crowell, 133 Mass. 355; State v. Colwell, 3 R. I. 132; George v. Joy, 19 N. H. 544; Morrison v. Chapin, 97 Mass. 76; Card v. Foot, 56 Conn. 369; Brotton v. Langert, 1 Wash. 267. In Dugan v. Mahoney, 11 Allen (Mass.), 572, the court said: "It is obvious that this species of evidence must be admissible in regard to numbers, dates and deliveries of goods, payments and receipts of money, accounts and

the like, in respect to which no memory could be sufficiently retentive without depending on memoranda, and even memoranda would not bring the transaction to present recollection. In such cases, if the witness on looking at the writing is able to testify that he knows the transaction took place though he has no present recollection of it, his testimony is admissible."

² See §§ 58-62. See, also, Cole v. Jessup, 10 N. Y. 96; 9 Barb. 395; Halsey v. Sinsebaugh, 15 N. Y. 485. If the witness on consulting the original memorandum does not find that it refreshes his memory so that he can speak of his own knowledge, the writing may be offered in evidence. Marcey v. Shults, 29 N. Y. 348. If a writing is already in evidence it is not error for the court to refuse to allow a witness to use it to refresh his memory. Burlington, etc. Co. v. Wallace, 28 Neb. 179; 44 N. W. Rep. 225.

³ 1 Greenl. on Ev., § 437; Russell v. Rider, 6 C. & P. 416; Rex v.

The other class of cases includes writings which the witness does not remember having seen before and of whose contents or correctness he has no present recollection, but, knowing the writing to be genuine, he is able on consulting it, and because of its aid and his confidence in its genuineness, to swear independently and of his own knowledge to the facts. Thus a subscribing witness seeing his own signature at the foot of an attestation clause will be enabled to testify that a testator executed a will though the witness has wholly forgotten some or all of the circumstances of the execution.¹

§ 338. Character of the writing used to refresh the memory of the witness.—The writing by which the witness refreshes his memory should be contemporaneous with the transactions that are mentioned in it.² This is the general rule which is supported by a majority of the cases, though it is sometimes qualified by the statement that the entry need not be *precisely* contemporaneous if it was made before the memory of the person making it had become weakened and unreliable by lapse of time.³ In many cases copies made some time after the original entry or writing have been permitted to be used if the witness could swear of his own knowledge to their accuracy.⁴ But a copy cannot be used by the

Ramsden, 2 id. 603; Baum v. Reay, 96 Cal. 462; 29 Pac. Rep. 117; Wagonseller v. Brown, 7 Pa. Co. Ct. Rep. 663; Little v. Lischkoff (Ala., 1893), 12 S. Rep. 429; Adae v. Zangs, 41 Iowa, 586; Huff v. Bennett, 6 N. Y. 337; Tibbetts v. Sternberg, 66 Barb. (N. Y.) 201; Peck v. Lake, 3 Lans. 136; Dew v. Downam, 1 Green, 135; Patterson v. Tucker, 4 Halst. 322; Bonnet v. Gladfeldt, 24 Ill. App. 583. *Contra*, Chattanooga, etc. Co. v. Owen (Ga., 1893), 15 S. E. Rep. 853.

¹ See *ante*, § 138.

² Williams v. Wager, 64 Vt. 326; Weston v. Brown, 35 Neb. 609; 46 N. W. Rep. 826; Com. v. Clancy, 154 Mass. 128; 27 N. E. Rep. 1001; Converse v. Hobbs, 64 N. H. 42; Spring Garden Ins. Co. v. Riley, 15

Md. 54; Watrous v. Cunningham, 71 Cal. 30; Burbank v. Dennis (Cal., 1893), 35 Pac. Rep. 444.

³ Culver v. Scott (Minn., 1893), 55 N. W. Rep. 552; Sisk v. State, 28 Tex. App. 432; Jones v. Stroud, 2 C. & P. 196; Howell v. Bowman (Ala., 1892), 10 S. Rep. 640; Bank v. Bollong, 24 Neb. 825. So it has been permitted counsel to refresh the memory of a forgetful witness by reading evidence given by him on a former trial from the stenographer's minutes. Ehrisman v. Scott (Ind., 1893), 32 N. E. Rep. 867; Batishill v. Humphreys, 64 Mich. 514; 38 N. W. Rep. 581.

⁴ Lord Talbot v. Cusack, 17 Ir. C. L. 213; Home v. McKenzie, 6 C. & F. 628; Birmingham v. McPoland (Ala., 1893), 11 S. Rep. 427; Anderson v.

witness until the absence of the original is accounted for.¹ A witness who has been called to testify to the value of materials may use a price list on the stand to aid him in forming a correct opinion, where it is shown that it is impossible for him to retain all the prices in his memory.²

§ 339. Cross-examination — Its object and value.— As a means of ascertaining the truth, the cross-examination of a witness in open court is correctly said to be at once effective and impartial.³ Writers on the law of evidence have frequently adverted to its peculiar efficacy and excellence as a method of investigating the motives and personal prejudices of the witness, and his relation to the parties and to the subject of the suit. So, also, his knowledge and general intelligence, the faithfulness of his memory, his impartiality or bias, his means of observation and his opportunities for gaining an accurate and full acquaintance with the facts and circumstances, may all be explored and ascertained for the consideration of the jurors, to aid them in determining what weight they should place upon his evidence.⁴

Imhof, 34 Neb. 335; Stavinow v. Home Ins. Co., 43 Mo. App. 513; Watson v. Miller, 82 Tex. 279; Watrous v. Cunningham, 71 Cal. 30; Bonnet v. Gladfeldt, 24 Ill. App. 533; Flint v. Kennedy, 33 Fed. Rep. 820; People v. Monroe (Cal., 1893), 33 Pac. Rep. 776; Burbank v. Dennis (Cal., 1893), 35 Pac. Rep. 444; Stondennie v. Harper, 81 Ala. 242; Caldwell v. Bowen, 80 Mich. 382.

¹ Byrnes v. Pacific Exp. Co. (Tex., 1891), 15 S. W. Rep. 46; Anderson v. Imhoff, 34 Neb. 335; 51 N. W. Rep. 854; Birmingham v. McPoland (Ala., 1893), 11 S. Rep. 427. That a witness may refresh his memory by reading a printed article published from manuscript supplied by him, see Hawes v. State, 88 Ala. 37.

² Morris v. Columbian Iron Works & D. D. Co. (Md., 1893), 25 Atl. Rep. 417.

³ "Cross-examination, which is the right of the party against whom a

witness is called, is a means of separating hearsay from knowledge,—error from truth; opinion from fact; influence from recollection; of ascertaining the order of the events as narrated by the witness in his examination in chief, the time and place when and where they occurred and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness." The Ot-tawa, 3 Wall. (U. S.) 271.

⁴ 1 Greenl. on Ev., § 446; 1 Stark. on Ev., §§ 160, 161. In Alison's Practice, p. 546, it is said: "Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his false-

It is sometimes an important question whether a party has so examined his own witness as to give his adversary the right to cross-examine him. A witness who has been sworn, but to whom no questions are put, cannot be cross-examined;¹ and this is true *a fortiori* where the only object of calling him is to obtain the production of a writing which is to be proved by another witness.² But error in refusing a party the right to cross-examine is absolutely waived by the party making the witness his own.³ It has been held that the parties to an action have a right to regard the witness of a third party intervening as adverse where the original parties have some interests in common against the intervenor. Both parties may therefore cross-examine the witnesses of the party intervening.⁴ The right and scope of a cross-examination as such are confined strictly to those matters concerning which the witness has already been interrogated on his direct examination. In other words, the counsel cross-examining will not be permitted to ask the witness leading and general questions upon matters which, though involved in the issue, were not touched upon in his direct examination.⁵

hood and give him time to consider how seeming contradictions may be reconciled. The most effectual remedy is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradictions in some parts of the testimony which it is desired to overturn."

¹ Austin v. State, 14 Ark. 555.

One of several jointly tried for a crime may be required to cross-examine the state's witnesses and produce his own before the same is done by his co-defendants. State v. Howard (S. C., 1892), 14 S. E. Rep. 481.

² Perry v. Gibson, 1 Ad. & El. 48;

Reed v. James, 1 Stark. 132; Bush v. Smith, 1 C. M. & R. 94; Davis v. Dale, 1 M. & M. 514; Summers v. Mosely, 2 C. & M. 477. A witness called only to prove a signature may be cross-examined. Yost v. Minn. Hard. Works, 41 Ill. App. 556.

³ Hemminger v. Western Ass. Co. (Mich., 1893), 54 N. W. Rep. 949. Cf. Territory v. Rehberg, 6 Mont. 467; 13 Pac. Rep. 132.

⁴ Succession of Townsend, 40 La. Ann. 66; 3 S. Rep. 488.

⁵ Eames v. Keiser, 142 U. S. 488; St. Louis & Iron M. R. R. Co. v. Silver, 56 Mo. 265; Bell v. Prewitt, 62 Ill. 362; Britton v. State, 115 Ind. 55; Haynes v. Ledyard, 33 Mich. 319; Adams v. State, 28 Fla. 511; Bullis v. Chicago, etc. R. Co., 76 Iowa, 680; Cramer v. Cullinane, 2 MacArthur (D. C.), 197; Freeman v. Hensley (Cal., 1893), 30 Pac. Rep. 792; Jones v. Roberts, 37 Mo. App.

If a witness while being cross-examined avoids replying or parries the questions, he may be pressed for an answer, and the counsel calling him should not be allowed to interpose frivolous objections to prevent a rapid cross-examination and to afford the witness an opportunity to fabricate evidence.¹ But the extent to which the same question may be repeated is largely in the discretion of the court.²

§ 340. Power of cross-examination — Its extent.—Though the court may exercise its discretion in allowing or refusing cross-examination as to irrelevant matters bearing on credibility alone, the right to cross-examine upon transactions directly relevant and which have been brought out on the direct examination is absolute. So the fact that relevant evidence, elicited by a proper question put on the direct examination, has been improperly stricken out, furnishes no basis for a claim that other strictly relevant evidence of the same matter should be expunged when stated on cross-examination.³ But the right to cross-examine a witness is not lost because the party fails to object to a direct examination out of the proper order.⁴ The proper remedy for a party who has had no opportunity of cross-examining an adverse witness is to move the court to strike out his evidence elicited on the direct examination and to request an instruction that the jury should disregard it.⁵ The extent to which a party may cross-examine his adversary's

177; *Lloyd v. Thompson*, 5 Ill. App. 90; *Pye v. Bakke* (Minn., 1893), 55 N. W. Rep. 904; *Buckley v. Buckley*, 12 Nev. 423; *In re Westerfield*, 96 Cal. 113; *Brady v. Henry*, 77 Cal. 324; *Anheuser-Busch Brewing Ass. v. Hutmacher*, 127 Ill. 656; *State v. Chamberlain*, 89 Mo. 132; *Hunsinger v. Hofner*, 110 Ind. 390; *State v. Farrington* (Iowa, 1894), 57 N. W. Rep. 606; *Bohan v. Avoca*, 154 Pa. St. 104; *Townsend v. Briggs* (Cal., 1893), 32 Pac. Rep. 307; *Chandler v. Beal*, 132 Ind. 596; *Hansen v. Miller* (Ill., 1893), 32 N. E. Rep. 548; *Amos v. State* (Ala., 1893), 11 S. Rep. 424; *Gale v. People*, 26 Mich. 157; *Mt. Vernon v. Brooks*, 39 Ill. App. 426; *Home Ben. Ass. v. Sargent*,

142 U. S. 691; *Rigdon v. Conley*, 31 Ill. App. 630; *Welcome v. Mitchell*, 81 Wis. 566; 51 N. W. Rep. 1080; *State v. Willingham*, 33 La. Ann. 537.

¹ *State v. Duncan* (Mo., 1893), 22 S. W. Rep. 699.

² *Brown v. State*, 72 Md. 477; 20 Atl. Rep. 140; *McGuire v. Manufacturing Co.*, 156 Mass. 324; *Sanders v. Bagwell* (S. C., 1893), 15 S. E. Rep. 714; *Lakens v. Hazlett*, 37 Minn. 441.

³ *Turnbull v. Richardson*, 60 Mich. 400; 37 N. W. Rep. 499.

⁴ *Graham v. Larimer*, 83 Cal. 173; 23 Pac. Rep. 286.

⁵ *People v. Cole*, 43 N. Y. 508.

witnesses upon matters not directly relevant to the issue, but which affect the credibility of the witness, is largely within the discretion of the judge,¹ and a reasonable exercise of this discretion will be always allowed in limiting the method or duration of the cross-examination or in admitting irrelevant questions tending to explain the motives,² opportunities³ and powers of observation, the knowledge,⁴ memory,⁵ reliability⁶ or good faith of the witness.⁷

Questions put to the witness designed to ascertain his relations, business or otherwise, towards the parties and his feelings or bias towards them are not objectionable.⁸ On the other hand, it is not reversible error for the court to refuse to permit the cross-examination to be unreasonably prolonged,⁹

¹ 1 Greenl. Ev., § 447; *Wallace v. Railroad Co.*, 119 Mass. 91; *Phillips v. Marblehead*, 148 Mass. 329; *Huntsville Belt Line & M. S. Ry. Co. v. Corpening* (Ala., 1893), 12 S. Rep. 295; *Birmingham F. I. Co. v. Pulver*, 18 N. E. Rep. 804; 126 Ill. 329; *Collar v. Potter*, 88 Mich. 549; *Graham v. McReynolds*, 90 Tenn. 673; *Holdridge v. Lee*, 52 N. W. Rep. 265; *State v. Norris*, 109 N. C. 820; *Riordan v. Guggerty*, 74 Iowa, 688; 39 N. W. Rep. 107; *State v. Miller*, 93 Mo. 263; *Gutsch v. McIlhargey*, 69 Mich. 377; *Gadbois v. Chicago, M. & St. P. R. R. Co.*, 75 Iowa, 530; *Schmidt v. McCarthy*, 43 Minn. 288.

² *People v. Thomas*, 92 Cal. 506; *Hartman v. Rogers*, 69 Cal. 643.

³ *State v. Avery* (Mo., 1893), 21 S. W. Rep. 193; *International R. R. Co. v. Dyer*, 76 Tex. 156; *Holmes v. State*, 88 Ala. 226.

⁴ *Hess v. Lowry*, 122 Ind. 225; *Williams v. State* (Fla., 1893), 13 S. Rep. 834; *Chicago, K. & N. R. Co. v. Stewart*, 47 Kan. 704; *Lentz v. Carnegie Bros. Co.*, 145 Pa. St. 612; *Schwartz v. Wood*, 67 Hun, 648; *Collar v. Potter*, 88 Mich. 549. A witness may be asked on cross-examination if he understood a question

asked him on the direct examination. *Pence v. Waugh* (Ind., 1893), 34 N. E. Rep. 860.

⁵ *State v. Duffy*, 57 Conn. 525; *Sewall v. Robbins*, 139 Mass. 164; *Davis v. California Pow. Works*, 84 Cal. 617. A witness may be asked to repeat on cross-examination his evidence to a particular point on his direct examination to test his memory and ascertain if he will contradict himself. *Zucker v. Carpeles*, 88 Mich. 413; *Beers v. Payment* (Mich., 1893), 54 N. W. Rep. 886.

⁶ *Hare v. Mahoney*, 60 Hun, 576.

⁷ *Doyle v. Beaupre*, 63 Hun, 624; *Pence v. Waugh*, *supra*; *Murray v. G. W. Ins. Co.*, 25 N. Y. S. 414; *Curren v. Ampersee* (Mich., 1893), 56 N. W. Rep. 87.

⁸ *Graham v. McReynolds*, 88 Tenn. 240; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *Com. v. Lyden*, 113 Mass. 452; *Knight v. Cunningham*, 13 N. Y. Supr. Ct. 100; *Thomas v. Loose*, 114 Pa. St. 47; *People v. Thomson*, 92 Cal. 596; *Jackson v. Litch*, 62 Pa. St. 451; *Schwartz v. Wood*, 67 Hun, 648; *United States v. Cross*, 20 D. C. 365; *Hamilton v. Hulett* (Minn., 1893), 53 N. W. Rep. 364; *Holmes v. State*, 88 Ala. 26.

⁹ *Hamilton v. Hulett* (Minn., 1893),

or for the court to refuse to allow the same question to be asked repeatedly when it has been once answered satisfactorily,¹ or to exclude questions which are designed solely to ascertain what witnesses it may be advantageous for the party to cross-examine.² While counsel may of right cross examine the witness as to relevant facts gone into on the direct examination, he should not be permitted to open his own case and present his evidence to the jury by a process of cross-examining the adverse witnesses.³

The general rule that excludes evidence of facts collateral to the issue⁴ is not applied so rigidly to the cross-examination as it is to the direct examination. The theory upon which cross-examination is allowed is that it is primarily adapted to ascertain the truth, not by eliciting positive *evidence directly bearing on the facts in issue*, but by furnishing a means of testing the truthfulness and credibility of the witness.⁵ It is never permissible on cross-examination to interrogate upon wholly irrelevant and collateral matters solely for the purpose of discrediting the witness by subsequently contradicting him directly *on that point* by other evidence.⁶ But it is proper to

53 N. W. Rep. 364; Pennsylvania Co. v. Newmeyer, 129 Ind. 501; Birmingham F. Ins. Co. v. Culver, 126 Ill. 329; 18 N. E. Rep. 804.

¹ Remer v. Long Island R. Co., 1 N. Y. S. 124; Gutsch v. McIlhargey, 69 Mich. 377; 37 N. W. Rep. 303; Mason v. Hinds, 19 N. Y. S. 996; Jones v. Stevens (Neb., 1893), 55 N. W. Rep. 251; Hughes v. Ward, 38 Kan. 452.

² United States v. Cross, 20 D. C. 365. An inquiry of a witness on cross-examination if he was a total abstainer, he having stated that the plaintiff had been discharged by his employer for drunkenness, is improper. Fox v. Railroad Co., 52 N. W. Rep. 623; 92 Mich. 243.

³ Adams v. State, 28 Fla. 511; 10 S. W. Rep. 106; Sullivan v. O'Leary, 146 Mass. 322; Burke v. Miller, 7 Cush. (Mass.) 547-550; Moody v.

Rowell, 17 Pick. 499; Mount Vernon v. Brooks, 39 Ill. App. 426.

⁴ See *ante*, § 210.

⁵ So where the witness testifying to a date states that on the date in question he looked into the almanac, he may be asked on cross-examination why he did so, though strictly speaking his reason is irrelevant. Thomas v. Miller, 151 Pa. St. 482.

⁶ 1 Greenl. Ev., § 449; Futch v. State (Ga., 1893), 16 S. E. Rep. 102; Hoover v. Cary (Iowa, 1893), 53 N. W. Rep. 415; Pye v. Bakke (Minn., 1893), 55 N. W. Rep. 904; State v. Elwood, 17 R. I. 763; Elkhart v. Witman, 122 Ind. 538; Morris v. Atl. Ave. R. R. Co., 116 N. Y. 552; People v. McKellar, 53 Cal. 65; Combs v. Winchester, 39 N. H. 1; Sutor v. Wood, 76 Tex. 403; People v. Hilhouse, 80 Mich. 580; Com. v. Hourigan (Ky., 1890), 12 S. W. Rep. 550; State v.

ask the witness whether he did not at some particular time or place give a different account of the relevant facts to that which he gave on his direct examination. If he denies that he has done so, a foundation is laid for impeaching him by the testimony of some one who heard him make the contradictory statement.¹ So, too, where the witness on cross-examination is questioned as regards his interest or prejudice, or, in other words, where the purpose of the questions is solely to elucidate his existing or previous relation or conduct towards the subject-matter or towards the parties, he may be contradicted by other evidence.² Thus, a witness may be asked on his cross-examination if he has not expressed feelings of hostility, or acted unfriendly towards the adverse party or towards the prisoner,³ and if he refuses to answer,⁴ or answers in the negative, the fact may be shown by the evidence of those who heard him.⁵ But if the witness state that although formerly

Rieck, 48 Kan. 635; *State v. Blakely*, 43 id. 250; *Davis v. California Pow. Works*, 84 Cal. 617; *People v. Tiley*, 84 Cal. 651; *Robbins v. Spencer*, 121 Ind. 594. But it seems that questions which would be irrelevant on the direct examination may be allowed on the cross-examination if they tend to explain the transaction in issue by bringing out particulars which were not touched upon by the party calling the witness (*Doyle v. Beaupre*, 63 Hun. 624; *Collar v. Potter*, 88 Mich. 549; *Pickard v. Bryant*, 92 Mich. 430; 52 N. W. Rep. 783; *Osbiston v. Kaufman*, 29 Pac. Rep. 748), because adverse to his case.

¹ See *infra*, § 350; *People v. Williams*, 18 Cal. 187; *State v. Baldwin*, 36 Kan. 1; *State v. Tabott*, 73 Mo. 347. And where a witness makes a certain statement on cross-examination, he may then be asked if he did not give different testimony on a former trial. *Hall v. Chicago R. Co.*, 52 N. W. Rep. 247.

² *Holdridge v. Lee* (S. D., 1893), 52 N. W. Rep. 265.

³ The prosecution may show the relationship between the witness and the prisoner, though this relationship may prejudice the latter in the eyes of the jury. *State v. McGahey* (N. D., 1893), 55 N. W. Rep. 753; *Burger v. State*, 83 Ala. 86.

⁴ *State v. McFarlain*, 41 La. Ann. 686.

⁵ *Lyle v. State*, 21 Tex. App. 153; *Atwood v. Welton*, 7 Conn. 63; *John Morris Co. v. Burgess*, 44 Ill. App. 27; *People v. Gillis* (Cal., 1893), 32 Pac. Rep. 586; *Garnsey v. Rhodes*, 138 N. Y. 461; *Bonnard v. State*, 25 Tex. App. 173; *Scott v. State*, 64 Ind. 400; *Crumpton v. State*, 52 Ark. 273; *Hamilton v. Manhattan Ry. Co.*, 9 N. Y. 313; *People v. Thomas*, 92 Cal. 506; *People v. Goldensen*, 76 Cal. 323; *Com. v. Byron*, 14 Gray, 31. The extent of the right to cross-examine on immaterial matters to ascertain bias is discretionary with the court. *Miller v. Smith*, 112 Mass. 470. The hostility of an adverse witness may be shown by the evidence of another witness without questioning the hos-

hostile to a party he is so no longer, testimony showing his previous hostility is irrelevant as being too remote.¹

§ 341. **Redirect examination.**—A witness may be re-examined by the party calling him when, on cross-examination, he has been questioned in regard to a prior contradictory statement,² or he may be requested to state his motives for acts done by him and described in his cross-examination.³ He may be questioned on re-examination with a view of ascertaining the real meaning of his statements made on his cross-examination and those made out of court in order to show that, though seemingly inconsistent, yet when rightly understood they are not contradictory.⁴ But counsel will not be permitted to go beyond this and bring in new matter consisting of statements neither explanatory of the contradictory utterances nor connected with them, although contained in the same conversation and relevant to the subject-matter of the suit.⁵ In re-examining a witness he may also be asked questions which will explain all facts which were brought out on his cross-examination⁶ from which wrong inferences might be drawn or which tend to cast doubts upon his credit.⁷

tile witness. *People v. Brooks*, 131 N. Y. 321; 30 N. E. Rep. 189. But evidence that a party had brought an action against an adverse witness is inadmissible in the absence of evidence showing the actual existence of a hostile feeling as the result of the suit. *Wischstadt v. Wischstadt*, 47 Minn. 38; 50 N. W. Rep. 225.

¹ *Consaul v. Sheldon*, 35 Neb. 247.

² *Butterfield v. Gilchrist*, 63 Mich. 155.

³ *Westbrook v. Aultman*, 3 Ind. App. 83; 28 N. E. Rep. 1011; *Com. v. Dill*, 156 Mass. 266; 30 N. E. Rep. 1016; *People v. Hanifan* (Mich., 1893), 56 N. W. Rep. 1048; *Railroad v. Randall*, 85 Ga. 297.

⁴ *Wilkersons v. Eilers* (Mo., 1893), 21 S. W. Rep. 134; *Dole v. Woolbridge*, 142 Mass. 184; *Smith v. State*, 21 Tex. App. 277; *State v. Reed*, 89 Mo. 168; *Fuller v. Jamestown, etc. Co.*, 26 N. Y. S. 1078.

⁵ *Miller v. Railroad Co.* (Iowa, 1893), 57 N. W. Rep. 418; *Prince v. Samo*, 7 Ad. & El. 627. But see *contra*, *Springfield v. Dalboy*, 139 Ill. 34; 29 N. E. Rep. 860.

⁶ "The examination and cross-examination must relate to facts in issue, or relevant, or denied to be relevant thereto; but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief. The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is by permission of the court introduced in re-examination, the adverse party may further cross-examine upon the matter." *Stephen's Dig. Ev.*, art. 127.

⁷ *State v. McGahey* (N. D., 1893), 55 N. W. Rep. 753; *Vanduzer v. Letellier*, 78 Mich. 492; *United States v. Barrells*, 8 Blatchf. 475;

A suggestive mode of interrogating a witness on the redirect examination, though sometimes permissible¹ and always in the discretion of the court, is not to be commended. Thus, counsel should not be allowed to extricate the witness from his difficulty by repeating to him his statement made on the direct examination, and then asking him if the statements made on cross-examination are consistent therewith.² Where the court in the exercise of its discretion permits a witness to answer irrelevant questions or to make irrelevant replies to relevant questions on the cross-examination, the party may on the redirect examination question him upon the same matters.³ If the adverse party desires to re-examine the witness after the redirect examination he may do so on the recross examination, but he will be restricted to new matter brought out on the redirect examination.

§ 342. **Recalling witnesses.**—Whether a witness, after having given his testimony and left the stand, shall be permitted to be recalled by the party in whose behalf he has testified, or for further cross-examination by the adverse party,⁴ is a matter wholly in the discretion of the court;⁵ and this

Norwegian Plow Co. v. Hanthorn, 71 Wis. 529; 37 N. W. Rep. 825; Pullen v. Pullen (N. J., 1888), 12 Atl. Rep. 138; Feather v. Reading, 155 Pa. St. 187; Alderton v. Wright, 81 Mich. 244. Accordingly where a witness acknowledged that a written statement had been prepared by the public prosecuting officer at whose bidding she signed, she will be allowed, on the redirect examination, to state that the statement was wholly voluntary, that it was true, and that its language was her own. People v. Mills, 54 N. W. Rep. 488; 94 Mich. 630.

¹ Smith v. State, 21 Tex. App. 277.

² Smith v. State, 21 Tex. App. 277; Stoner v. Devilbiss, 70 Md. 160; Ohlsen v. Terrero, L. R. 10 Ch. App. 127; Wells v. Jackson I. Mfg. Co., 48 N. H. 491; Moody v. Rowell, 17 Pick. 498; Gunter v. Watson, 4 Jones' (N. C.) L. 455. If a party in

cross-examining brings out a partial disclosure of a transaction which is not admissible if coming from his opponent, the latter may on his redirect examination make a full discovery. Howe v. Schwemberg, 4 Misc. Rep. 73; Simmons v. Havens, 101 N. Y. 427.

³ People v. McNamara, 94 Cal. 509; Furbush v. Goodwin, 5 Fost. (N. H.) 425; Uhe v. Chicago M. etc. Co. (S. D., 1893), 54 N. W. Rep. 601; State v. Cardoza, 11 S. C. 195; Schaser v. State, 36 Wis. 429; Goodman v. Kennedy, 10 Neb. 270; Blewett v. Tregonning, 3 Ad. & El. 554, 565, 581, 584, cited in 1 Greenl. Ev., § 468. *Contra*, Lake Erie, etc. Co. v. Morain, 36 Ill. App. 632; 29 N. E. Rep. 869.

⁴ People v. Parton, 49 Cal. 632.

⁵ Louisville, etc. Co. v. Barker (Ala., 1893), 10 S. Rep. 453; Gulf, C. & S. F. Ry. Co. v. Pool, 70 Tex. 713;

discretion, it has been held, was not abused where a witness was recalled after a direct, cross, redirect and recross-examination.¹

So if the witness was unable to answer positively or definitely when on the stand, it is proper to refuse to permit him to be recalled later for an additional examination,² or to permit a witness who has already testified fully and satisfactorily to a certain transaction to be recalled for the sole purpose of having him repeat his testimony or to obtain cumulative testimony on the same point.³ But the fact that a witness on being recalled merely reiterated his previous testimony does not constitute error provided no practical injustice has resulted thereby.⁴ If a witness is recalled for further direct examination or for further cross-examination, the adverse party has the right of further cross-examination or of further redirect examination respectively.⁵

§ 343. **Receiving evidence out of court.**—It is highly improper for the jury to seek or to receive evidence out of court, and such an act, where their verdict is influenced thereby, will furnish ground for its reversal. Thus, the jurors will not be allowed to experiment,⁶ to take a private view of the premises,⁷ or to communicate with other persons,⁸ particu-

Fowler v. Strawberry Hill, 74 Iowa, 644; 38 N. W. Rep. 521; Riley v. State, 88 Ala. 193; Nixon v. Beard, 111 Ind. 137; State v. Dilley, 15 Oreg. 70; Humphreys v. State, 78 Wis. 569; 47 N. W. Rep. 836; Snodgrass v. Com. (Va., 1893), 17 S. E. Rep. 238; State v. Huff, 76 Iowa, 200; Graves v. Santway, 6 N. Y. S. 892; Huff v. Latimer (S. C., 1890), 11 S. E. Rep. 758; Francis v. Roosa, 151 Mass. 532. In State v. Clyburn, 16 S. C. 375, it was held a proper exercise of the judicial discretion to permit a witness to be recalled by the state to testify to a single fact, though the examination of the defendant's witnesses was interrupted and suspended thereby.

¹ Hollingsworth v. State, 4 S. E. Rep. 560; 79 Ga. 605; State v. Jacobs,

28 S. C. 29; 4 S. E. Rep. 799; Richmond & D. R. Co. v. Vance, 93 Ala. 144; Brown v. State, 72 Md. 468.

² Bonnet v. Gladfeldt, 24 Ill. App. 533; 120 Ill. 166; 11 N. E. Rep. 250.

³ Chicago, etc. Co. v. Hazels (Neb., 1889), 42 N. W. Rep. 93.

⁴ Dillard v. State, 58 Miss. 368.

⁵ Stephen's Dig., art. 126.

⁶ Jim v. State, 4 Humph. (Tenn.) 289; Yates v. People, 38 Ill. 527; Forehand v. State, 51 Ark. 553; Indianapolis v. Scott, 72 Ind. 196; State v. Sanders, 68 Mo. 202.

⁷ Harrington v. Worcester, etc. Co. (Mass., 1893), 32 N. E. Rep. 955; Woodbury v. Anoka (Minn., 1893), 54 N. W. Rep. 187; Garside v. Watch Case Co., 17 R. I. 691.

⁸ Wynn v. Railroad Co. (Ga., 1893), 17 S. E. Rep. 649; Hager v. Hager,

larly witnesses.¹ Neither party has any legal right to submit documentary or other evidence to the jury except during the pendency of the trial and in the presence of the court. Upon this principle the reception of evidence outside of court will vitiate the verdict. So writings not a part of the evidence,² as, for example, maps,³ and legal or scientific books and publications,⁴ are not permitted to be perused by the jury. But they may of course consult the pleadings,⁵ memoranda or notes of the judge's instructions,⁶ and all papers which constitute a part of the evidence.⁷ But writings forming no part of the evidence

38 Barb. 92; *People v. Boggs*, 20 Cal. 432; *State v. Dorsey*, 40 La. Ann. 739; *Epps v. State*, 19 Ga. 102; *State v. Fruge*, 28 La. Ann. 657; *Dower v. Church*, 21 W. Va. 24, 55; *March v. State*, 44 Tex. 64; *Petersen v. Siglinger* (S. D., 1893), 52 N. W. Rep. 1060; *Collier v. State*, 20 Ark. 36.

¹ See cases in last note. If a juror has personal knowledge of the facts in issue or of the character of a party or a witness, he should be called to give his evidence as a witness in open court. Where the verdict is based upon or influenced by statements of matters known to a juror alone, made by him in the jury-room, which would be evidence if he were on the witness stand, a new trial should be granted. *People v. Thornton*, 74 Cal. 48; *Winslow v. Morrill*, 68 Me. 362; *McKiesick v. State*, 26 Tex. 673; *Anshicks v. State*, 6 Tex. App. 527; *Salina v. Tuspar*, 27 Kan. 544; *Wade v. Ordway*, 57 Tenn. 229; *Taylor v. State*, 52 Miss. 84; *Wood River Bank v. Dodge* (Neb., 1893), 55 N. W. Rep. 234; *Lucas v. State*, 27 Tex. App. 322.

² *State v. Hartman*, 46 Wis. 478; *Cavanaugh v. Buehler*, 120 Pa. St. 441; *Munde v. Lambre*, 125 Mass. 367; *State v. Lantz*, 23 Kan. 728; *Chase v. Perley*, 148 Mass. 289; *McLeod v. Railway Co.*, 71 Iowa, 138;

Toohy v. Lewis, 78 Ind. 474; *Meyer v. Cadwalader*, 40 Fed. Rep. 32.

³ *Moore v. McDonald*, 68 Md. 321; *State v. Hartman*, 46 Wis. 248; *State v. Lantz*, 23 Kan. 728.

⁴ *Johnson v. State*, 27 Fla. 245; *Chamberlain v. Pybus*, 81 Tex. 511; *Merrill v. Mary*, 10 Allen (Mass.), 416; *State v. Wilson*, 40 La. Ann. 757; *State v. Smith*, 6 R. I. 33; *State v. Tanner*, 38 La. Ann. 307; *Bernhart v. State*, 82 Wis. 23; *Harris v. State*, 24 Neb. 803; *State v. Hopper*, 71 Mo. 425; *State v. Gilleck*, 10 Iowa, 98; *Moon v. State*, 68 Ga. 687; *State v. Harris*, 34 La. Ann. 118.

⁵ *Hitchins v. Frostburg*, 68 Md. 100; *Smith v. Holcomb*, 99 Mass. 553.

⁶ *Cowles v. Hayes*, 71 N. C. 231; *State v. Thompson*, 83 Mo. 257; *Posey v. Patton*, 109 N. C. 455; *Henly v. State*, 29 Ark. 17.

⁷ *Hudspeth v. Mears* (Ga., 1893), 17 S. E. Rep. 837; *People v. Formosa*, 61 Hun. 272; *Territory v. Jones*, 6 Dak. 85; *State v. Raymond*, 53 N. J. L. 528; *Baker v. Com.* (Ky., 1892), 17 S. W. Rep. 625 (deposition); *State v. Thompkins*, 71 Mo. 63; *People v. Cochran*, 61 Cal. 548; *Paige v. Chedsey*, 23 N. Y. S. 879; *Beeks v. Odom*, 70 Tex. 183; *Hewitt v. Railroad*, 67 Mich. 61; *Shoms v. Ziegler*, 10 Phila. (Pa.) 315; *Davis v. State*

should not be allowed in the jury-room¹ unless both parties consent. On general principles of justice, the impropriety of permitting the jurors to take with them from the court articles which have been used to explain the evidence and from which they may draw, in the absence of the court and the accused, erroneous inferences of fact, will be readily admitted. So to permit the jury to take with them into the jury-room a weapon with which it is alleged a crime was committed is reversible error, as such a course of action is likely to result in serious injustice to the accused.² If the accused consents to it, however, it seems that even articles not in evidence may be taken by the jury to aid them in their deliberations.³

§ 344. Taking the view by the jury.—In some of the states it is permitted by statute for the court to order the jury to be taken in a body and in charge of a sworn officer to the place where the subject under litigation is located or where a fact material to the issue occurred. But a view cannot be ordered in the absence of statute⁴ without the consent of the parties to the cause.

* The exercise of the statutory authority to grant a view of the premises lies wholly in the discretion of the court,⁵ and to

(Ga., 1893), 17 S. E. Rep. 292; *Cargill v. Com.* (Ky., 1893), 20 S. W. Rep. 782; *Sholly v. Dillar*, 2 Rawle (Pa.), 147; *Posey v. Patton*, 109 N. C. 455; *Wood v. Wood*, 47 Kan. 617; *Nott v. Thomson*, 35 S. C. 461; 14 S. E. Rep. 940; *Chamberlain v. Pybus*, 81 Tex. 511; *Falvey v. Richmond*, 87 Ga. 99; *Avery v. Moore*, 133 Ill. 74; *Mooney v. Hough*, 84 Ala. 80; *Cockrill v. Hall*, 76 Cal. 192.

¹ *State v. Baker* (Oreg., 1893), 32 Pac. Rep. 161; *Himes v. Krehl*, 154 Pa. St. 190; *Spalding v. Saltill* (Colo., 1893), 31 Pac. Rep. 486 (pleadings excluded); *Hefrom v. Gallup*, 55 Me. 563; *Oskaloosa College v. Western U. T. Co.* (Iowa, 1893), 54 N. W. Rep. 152, and cases in last note. The indictment in a criminal trial is not evidence, nor should it be read to or by the members of the

jury as evidence, either in the court-room or elsewhere. It is proper to instruct the jury that the indictment has no evidential value and to point out to them its true use and signification. *State v. Hart*, 66 Mo. 208.

² *Forehand v. State*, 51 Ark. 553; 11 S. W. Rep. 766.

³ *People v. Mahoney*, 77 Cal. 529.

⁴ *Com. v. Webster*, 5 Cush. (Mass.) 295, 298; *Smith v. State*, 42 Tex. 444; *State v. Bertin*, 24 La. Ann. 46; *Bostock v. State*, 61 Ga. 635, 639; *Doud v. Guthrie*, 13 Bradw. (Ill.) 653.

⁵ *Jenkins v. Railroad Co.*, 110 N. C. 438; *Springer v. Chicago*, 37 Ill. App. 206; 135 Ill. 532; *Stewart v. Railroad Co.*, 86 Mich. 315; *Springfield v. Dalbey*, 139 Ill. 34; 29 N. E. Rep. 860; *Kan. Cent. R. R. v. Allen*, 22 Kan.

obtain a new trial for a refusal to grant a view—it must be clearly shown that the view was necessary, practicable, and that by the request being denied the party was injured.¹ Where a jury trial is had in equity it has been held that the judge should accompany the jury in taking the view.² And in some cases the power may be exercised *sua sponte*, while in others the view can only be ordered if requested by a party. The subject depends wholly upon the terms of the statutes, which should be consulted.

Whether the object of the view is to supply the jury with evidence or to enable them to comprehend more clearly the evidence given in court has been differently decided. The latter proposition is supported by the weight of the decisions and seems most consistent with the well-recognized rules of evidence and procedure.³ The opposite opinion is not without support.⁴ So the question of the right of the accused to be present when the view is ordered in a criminal trial is still unsettled. If the knowledge thus acquired by the jury be regarded as evidence, his presence is indispensable, as he has a constitutional right to confront the witnesses in the presence of the court and to hear the evidence against him,⁵ while

285; Chicago, etc. Co. v. Leah, 41 Ill. App. 584, 592; Gunn v. Ohio, etc. Co., 37 W. Va. 421; Klepsch v. Donald, 4 Wash. St. 436; Board v. Castetter (Ind., 1893), 33 N. E. Rep. 986; King v. Iowa Midland R. Co., 34 Iowa, 458; Chute v. State, 19 Minn. 271; Owen v. Miss. Pac. R. Co., 38 Fed. Rep. 571; Smith v. Railroad Co., 32 Minn. 1; Leonard v. Armstrong, 75 Mich. 577; Snow v. Railroad, 6 Me. 230; Boardman v. Westchester Fire Ins. Co., 54 Wis. 364; Baltimore, etc. R. Co. v. Polly, 14 Gratt. (Va.) 447, 470; People v. Bonny, 19 Cal. 426.

¹ Hudson v. Roos, 76 Mich. 173; Gunn v. Railroad Co., 36 W. Va. 165; Stewart v. Cincinnati, etc. Co., 89 Mich. 315.

² Fraedrich v. Flieth, 64 Wis. 184; Jeffersonville, etc. R. Co. v. Bowen, 40 Ind. 545.

³ Morrison v. Railroad (Ia., 1892), 57 N. W. Rep. 75; Heady v. Vevay Turnpike Co., 52 Ind. 117; Parks v. Boston, 15 Pick. (Mass.) 209; Columbus v. Billingsmeier, 7 Ohio Cir. Ct. Rep. 136. "The purpose is to enable the jury the better to understand the testimony and thereby the more intelligently to apply it to the issues; not to make them silent witnesses, burdened with testimony unknown to the parties and with no opportunity for cross-examination or correction of error if any is made." Anderson's Law Dict. See Close v. Samm, 27 Iowa, 507.

⁴ Washburn v. Railway Co., 59 Wis. 364, 368; Parks v. Boston, 15 Pick. (Mass.) 198; Toledo, etc. R. Co. v. Dunlap, 47 Mich. 456; Springfield v. Dalbey, 139 Ill. 34.

⁵ Benton v. State, 30 Ark. 328; People v. Bush (Cal.), 10 Pac. Rep.,

if this view be repudiated his presence, while allowable, is never indispensable.¹

In proceedings to condemn land under the exercise of the right of eminent domain, where a jury trial is allowed, the members of the jury act as *quasi*-assessors in fixing the value of the land taken, and under such circumstances the information obtained may justly be deemed evidence.² The view may be had after the summing up,³ but no oral evidence should then be admitted during its progress, the duty of the showmen being only to point out the place itself.⁴

§ 345. “Real evidence”—Physical examination by the jury in court—Identification.—By “real evidence” is meant that evidence which is obtained through the eyes by the inspection of a person or thing by the judge or jury in open court.⁵ The question of the production of articles in court to illustrate the evidence having been considered elsewhere,⁶ it will be necessary in this place to consider those cases only in which some question of personal identity or resemblance is involved, and in which the person himself may be required to submit to the examination of the jury.

Where the legitimacy of a child is in issue the court has often permitted it to be exhibited to the jury in court in order that they, from a personal inspection, and comparison with its putative parent, may be enabled to ascertain whether or not it resembles the latter.⁷ But where the child was very young,

169; *Carroll v. State*, 5 Neb. 1; *Foster v. State* (Miss., 1893), 12 S. Rep. 822. “A person accused of a crime is deprived of his right of appearing in person and of being confronted with the witnesses against him if the jury view the *locus in quo* without his presence.” *People v. Lowrey*, 70 Cal. 193. But see *contra*, *Blythe v. State*, 4 Ohio Cir. Ct. Rep. 435.

¹ *Com. v. Knapp*, 9 Pick. (Mass.) 496; *State v. Adams*, 20 Kan. 311; *Com. v. Webster*, 5 Cush. (Mass.) 295; *People v. Yut Ling*, 74 Cal. 569; *State v. Ah Lee*, 8 Oreg. 214; *Reg. v. Martin*, L. R. 1 Cr. Cas. Res. 378; *State v. Sasse*, 72 Wis. 3.

² *Remy v. Mun.* No. 2, 12 La. Ann. 500, 503; *Mich. etc. R. Co. v. Barnes*, 44 Mich. 222; *Parks v. Boston*, 12 Pick. (Mass.) 209; *Toledo, etc. R. Co. v. Dunlap*, 47 Mich. 456; *Harper v. Lexington, etc. R. Co.*, 2 Dana (Kan.), 227; *Washburn v. Railway Co.*, 59 Wis. 364; *Springfield v. Dalbey*, 139 Ill. 34.

³ *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377; *Ken. Cent. Ry. Co. v. Smith*, 20 S. W. Rep. 392.

⁴ *Heyward v. Knapp*, 22 Minn. 5; *State v. Lopez*, 15 Nev. 407.

⁵ *Gaunt v. State*, 50 N. J. L. 491.

⁶ *Ante*, § 39.

⁷ *Warlick v. White*, 76 N. C. 175;

evidence obtained in this way has been held to be irrelevant because, the child's features and personal appearance not having yet assumed a permanent character, the resemblance, if any, would be fallacious.¹ The resemblance alone, however striking, while insufficient evidence to go to the jury as sole proof of paternity, is a circumstance for them to consider in connection with evidence of other relevant facts. Where an inspection of this sort is made by the jury, the person is regarded as an exhibit from which the jury alone are to draw inferences without any oral comments or accompanying explanation, in the same manner that they adopt in the case of any relevant testimony. The appearance of the person, his form, features and complexion as they appear to the eyes of the jurors, being evidence of facts within common knowledge, it is a usurpation of the powers of the jury to admit the opinions of expert or of other witnesses upon such points in connection with the inspection of the person himself.²

Similar comparisons have been allowed where a person's race or color was in issue. Here an inspection is of great value on account of the more or less marked external racial characteristics which enable all men of ordinary intelligence to distinguish between the various races of mankind.³ So where the issue is negligence there can be no objection to permitting the plaintiff to show to the jury the injured mem-

State v. Horton, 100 N. C. 443; *Hutchison v. State*, 19 Neb. 263; *State v. Smith*, 54 Iowa, 104; *Risk v. State*, 19 Ind. 152; *Crow v. Jordan*, 49 Ohio St. 655; *Gilmanton v. Ham*, 38 N. H. 108; *Finnegan v. Dugan*, 14 Allen, 197; *Scott v. Donovan*, 153 Mass. 378; *State v. Arnold*, 13 Ired. (N. C.) 184; *State v. Woodruff*, 67 N. C. 89.

¹*State v. Danforth*, 48 Iowa, 43; *Ingram v. State*, 24 Neb. 33; *Clark v. Bradstreet*, 80 Me. 456; 15 Atl. Rep. 26; *Overlook v. Young*, 81 Me. 348; *Hanawalt v. State*, 64 Wis. 84; *Fuller v. Carny*, 29 Hun, 47; *Risk v. State*, 19 Ind. 153.

²*Jones v. Jones*, 45 Md. 148; *Eddy*

v. Gray, 4 Allen, 435. In *Garvin v. State*, 52 Miss. 507, the court said: "Juries may use their eyes as well as their ears." So on cross-examination a party or a witness who has testified that he cannot read (*Ord v. Fowler*, 31 Kan. 478), or has been physically injured to such an extent that he is unable to walk (*Hatfield v. Railroad Co.*, 33 Minn. 130), may or may not be directed to read or walk in the presence of the jury in the discretion of the court.

³*Garvin v. State*, 52 Miss. 207; *Clark v. Bradstreet*, 80 Me. 456; *Jacobs' Case*, 5 Jones (N. C.), 259; *Warlick v. White*, 76 N. C. 175; *State v. Arnold*, 13 Ired. (N. C.) 184.

ber or part of his body as evidence of the effect of the alleged negligence of the defendant.¹

Whether or not the jury will be permitted to determine the age of a person from his personal appearance or his demeanor on the witness stand in the total absence of oral evidence has been variously decided. Some of the cases hold that knowledge obtained by such an examination would be satisfactory evidence of age.² Other cases hold that such evidence is incompetent,³ and that the jurors should not be permitted to determine age solely from an inspection of the person.

Though evidence of resemblance, identity, race or age thus obtained by inspection admittedly possesses little probative force because of the unreliability of the untrained powers or faculties of human observation, this objection cannot be justly urged to its admissibility, if it is deemed relevant, though it may bear upon its credibility. Whether a compulsory examination by the jury of one accused of crime can be construed into infringing his constitutional right to be protected from furnishing evidence against himself depends on circumstances.

Where the accused waives his constitutional privileges by going on the stand and submitting to cross-examination in his own behalf, he may be directed to exhibit a part of his person to the jury.⁴ And if the defendant voluntarily, in open court, stand up and, without objection, permit a witness to identify him as the person who committed the crime, he cannot afterwards ask for a new trial on this ground.⁵

Pointing out a person by a witness to the jury without naming him is a sufficient identification,⁶ while if the prisoner

¹Cunningham v. Union Pac. R. Co., 4 Utah, 206; 7 Pac. Rep. 795; Schroeder v. Chicago, etc. Co., 47 Iowa, 375; Louisville, etc. Co. v. Wood, 113 Ind. 548; Mulhado v. Brooklyn, etc. Co., 30 N. Y. 370.

²New York Pen. Code, § 19; State v. Arnold, 13 Ired. (N. C.) 184; Com. v. Emmons, 98 Mass. 6; Keith v. New Haven & N. R. Co., 140 Mass. 175.

³Stephenson v. Arnold, 28 Ind. 278; Bird v. State, 104 Ind. 384.

⁴State v. Ah Chuey, 14 Nev. 70;

State v. Woodruff, 67 N. C. 89; State v. Hall (Iowa, 1890), 44 N. W. Rep. 914; Garvin v. State, 52 Miss. 207; State v. Wieners, 66 Mo. 13; Beavers v. State, 58 Ind. 530; Short v. State, 63 Ind. 376; McDoud v. State, 90 Ind. 320; Story v. State, 99 id. 413. *Contra*, Blackwell v. State, 67 Ga. 76.

⁵Gallaher v. State, 28 Tex. App. 247; 12 S. W. Rep. 1087; People v. Goldensen, 76 Cal. 328.

⁶Com. v. Whitman, 121 Mass. 361.

refuse to arise to be identified the witness may explain and rectify his failure or mistake made in the attempt to identify him;¹ nor will all the testimony of the witness be expunged because he totally fails to identify a prisoner who will not stand up for that purpose.²

§ 346. Right of the defendant in a criminal trial to confront the witnesses against him.—By various guaranties contained in the United States constitution and in the constitutions of the several states, it is provided that the accused in a criminal trial shall be entitled to meet his accusers face to face and that he shall be confronted with the witnesses against him.³ A statutory provision that the testimony of a deceased or absent witness shall be competent in a subsequent trial of the accused when, at the first trial, a full opportunity was given the prisoner to cross-examine him, is not a violation of such a constitutional provision.⁴ Nor is it violated by a rule of practice which permits the state to admit that a witness would testify as it is claimed he would in an affidavit by the accused asking for a continuance because of his absence,⁵ or by a consent to admit depositions⁶ of absent witnesses, or by the fact that the testimony of a witness against the accused was taken at the trial by means of an interpreter,⁷ or by a statutory provision that if the accused shall escape after the trial has commenced the trial may proceed and the witnesses may be examined in his absence.⁸

Under some circumstances, particularly where the accused has had an opportunity of cross-examining the witnesses against him at the preliminary examination, their depositions may be read at his trial. But it has been held that a stenographic report of the testimony taken at the preliminary examination is inadmissible at the trial, as its admission con-

¹ *People v. Foley*, 27 Weekly Dig. (N. Y.) 217.

² *Walsh v. People*, 88 N. Y. 458; *Abb. Brief on Facts*, § 457.

³ *Const. U. S., Am.*, art. 6; *Const. Ill.*, art. 2, § 9; *Westfall v. Madison Co.*, 62 Iowa, 427. The provision in the federal constitution is not applicable to trials in state courts.

People v. Fish, 125 N. Y. 156. *Cf. People v. Penhallow*, 42 Hun, 103.

⁴ *Com. v. Cleary*, 23 Atl. Rep. 1110; 30 W. N. C. 1; 148 Pa. St. 26. *Cf. People v. Fish*, 125 N. Y. 126.

⁵ *Hoyt v. People*, 140 Ill. 588.

⁶ *People v. Murray*, 52 Mich. 288.

⁷ *State v. Hamilton*, 42 La. Ann. 1204.

⁸ *Gore v. State*, 52 Ark. 285.

stitutes an infringement of the right of the accused to be confronted with the witnesses against him in the presence of the court.¹ When, however, the absence of the adverse witnesses is brought about by the accused, the latter cannot complain if their testimony, given at a former trial, is introduced in evidence against him.² The constitutional right to confront the witnesses is reciprocal in its nature. Accordingly the public prosecutor may demand that the witnesses for the prisoner shall, when possible, be produced in court in order that they may give their testimony orally and be submitted to a cross-examination.³

§ 346a. The accused as a witness in a criminal prosecution.—By modern statutes the accused is now a competent witness in his own behalf, though he cannot, in view of existing constitutional provisions,⁴ be placed upon the stand as a witness against himself. If he shall go on the stand in his own behalf, the credibility of his testimony is a question solely for the jury, though it is not error for the court to instruct the jury that they should⁵ or that they may⁶ consider the fact of his interest in the event of the trial, and that the fact that he is testifying in his own behalf may be considered by them in estimating the credit to be given him. The jury should not,

¹ *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Gardner* (Cal., 1893), 82 Pac. Rep. 880.

² *Howser v. Com.*, 51 Pa. St. 338. In *People v. Brogle*, 88 N. Y. 585; 10 Abb. N. C. 300, it was held that no error was committed by permitting a cross-examination by counsel for defense while defendant was temporarily absent.

³ *United States v. Angell*, 11 Fed. Rep. 34.

⁴ U. S. Const., Fifth Amend. The constitutional provision has been held applicable not only to criminal proceedings in court but to the case of accused persons summoned to appear before the interstate commerce commissioners (*Counselman v. Hitchcock*, 142 U. S. 547), and to contempt proceedings. In *re McKenna*, 47 Kan. 738.

⁵ *State v. Renfrew*, 111 Mo. 589; *People v. Cronin*, 34 Cal. 191; *People v. Crowley*, 102 N. Y. 234; *Anderson v. State*, 104 Ind. 367; *Wilkins v. State* (Ala., 1893), 13 S. Rep. 312; *Chambers v. People*, 105 Ill. 489; *State v. Moelchen*, 53 Iowa, 310; 5 N. W. Rep. 186; *State v. McGinnis*, 76 Mo. 326; *State v. Slingerland*, 19 Nev. 135.

⁶ *Wilkins v. State* (Ala., 1893), 13 S. Rep. 312; *Spies v. People*, 123 Ill. 1; 123 U. S. 131; *State v. Maguire* (Mo., 1893), 21 S. W. Rep. 212; *State v. Ihrig*, 106 Mo. 267; *Faulkner v. Territory* (N. Mex., 1893), 30 Pac. Rep. 965; *Siebert v. People* (Ill., 1893), 32 N. E. Rep. 431. *Contra*, *Townsend v. State* (Miss., 1893), 12 S. Rep. 209. *Cf. Com. v. Wright*, 107 Mass. 403.

however, permit the fact that the witness is accused of crime to influence them to such an extent that they will disregard all his testimony if it is otherwise credible, but should remember that the prisoner is presumed to be innocent until his guilt is shown upon the whole evidence beyond a reasonable doubt.¹

Where a person accused of crime takes the stand as a witness in his own behalf he waives his peculiar constitutional privileges,² and is subject to the ordinary rules of examination, and may be asked the same questions on cross-examination in regard to his previous life as any other witness.³ He may be asked questions tending to criminate him by connecting him with the crime for which he is on trial,⁴ and his previous arrest,⁵ indictment or conviction of crime,⁶ his prior contradictory statements⁷ or disorderly actions,⁸ or disbelief

¹ Bird v. State, 107 Ind. 154; Randall v. State, 32 N. E. Rep. 305; 132 Ind. 539; State v. Wells, 111 Mo. 589; State v. Sullivan, 28 N. E. Rep. 381; 114 Ill. 24; State v. Sandars, 106 Mo. 188; 17 S. W. Rep. 223. See *ante*, § 234.

² Clark v. State, 87 Ala. 71.

³ Disque v. State, 49 N. J. L. 249.

⁴ People v. Spies, 122 Ill. 1. See *post*, § 354a, for other cases cited on this point. In some states by statute it is allowable for the state to cross-examine the prisoner only as to those matters referred to in his direct examination. These statutes are strictly construed. State v. Sanders, 14 Oreg. 300; State v. Underwood, 44 La. Ann. 852; State v. Baker, 44 id. 1168; Elliott v. State, 34 Neb. 48; 51 N. W. Rep. 215; State v. Turner, 110 Mo. 196; 19 S. W. Rep. 645; State v. Chamberlain, 89 Mo. 129. Under these statutes, which are construed strictly in favor of the prisoner, it has been held reversible error to allow the cross-examination to extend beyond the limits of the direct, not only as regards matters relevant to the issue,

but also as regards questions affecting the credibility of the accused as a witness. And this is so where a different rule is applicable to other witnesses. State v. Lurch, 12 Oreg. 99, and other cases cited *supra* in this note.

⁵ State v. Murphy (Tex., 1893), 13 S. Rep. 229; People v. Foote, 93 Mich. 38.

⁶ State v. Minor (Mo., 1893), 22 S. W. Rep. 1083; State v. Alexis, *supra*; Childs v. State (Tex., 1893), 22 S. W. Rep. 1039; State v. McGuire, 15 R. I. 53; Prior v. State (Ala., 1893), 13 S. Rep. 681. A prior conviction of an infamous crime does not deprive the defendant in a criminal trial of the statutory right to testify in his own behalf. Williams v. State, 12 S. W. Rep. 1103; 28 Tex. App. 301. Cf. §§ 317, 318, 319.

⁷ Hicks v. State (Ala., 1893), 13 S. Rep. 375; May v. State (Tex., 1894), 24 S. W. Rep. 910; Brubaker v. Taylor, 76 Pa. St. 83; State v. Avery (Mo., 1893), 21 S. W. Rep. 193; Hoffman v. State, 28 Tex. App. 174.

⁸ People v. McCormack, 135 N. Y. 663; Com. v. Barry, 8 Pa. Co. Ct. Rep. 216.

in religion,¹ his attempt to bribe a witness,² or his simulated insanity,³ may all be brought out by questions put to him to show what credit he is entitled to as a witness.⁴

When one of several jointly indicted goes on the stand to testify in his own behalf alone, he is open to cross-examination, not only by the district attorney but by the counsel who represent the other defendants.⁵ The cross-examination of the accused should be conducted in a regular manner; nor can he be directly interrogated by the district attorney until he is properly turned over to him at the close of the direct examination for that purpose. But where the defendant, on taking his seat after his direct examination, impulsively declares to the jury that he is a peaceable, law-abiding citizen, and that he had no idea of committing the crime with which he is charged, it is not reversible error to permit the district attorney to ask him if he had not had trouble with many other persons.⁶ It has also been held that the court may recall the accused after his examination for the purpose of further cross-examination.⁷

The counsel for the accused is not precluded from objecting to questions put to the latter on his cross-examination upon the ground that they are irrelevant. In this respect he has the same right to object to irrelevant questions put to his client as he would have if they were put to any other witness called by him.⁸

¹ *State v. Turner*, 36 S. C. 534.

² *Bates v. Holladay*, 31 Mo. App. 162.

³ *State v. Pritcher*, 101 N. C. 667.

⁴ *Bell v. State*, 31 Tex. Crim. Rep. 276; *People v. Tice*, 131 N. Y. 651; *McDaniel v. State* (Ala., 1883), 12 S. Rep. 241; *State v. Farmer*, 84 Me. 436; *State v. Walsh*, 44 La. Ann. 1122; *Parker v. State* (Ind., 1893), 35 N. E. Rep. 1105; *United States v. Brown*, 40 Fed. Rep. 457; *Mitchell v. State*, 94 Ala. 68; 10 S. Rep. 518; *Com. v. Goodnow*, 154 Mass. 487; *Keyes v. State*, 122 Ind. 527; *Com. v. Lamon*, 155 Mass. 168; *State v. Buell*, 89 Mo. 595; *State v. McGuire*, 15 R. I. 23. Evidence that on a former trial for a similar crime

defendant made a similar defense is not admissible to impeach him. *Com. v. Lamon*, 29 N. E. Rep. 467; 155 Mass. 168.

⁵ *Com. v. Mullen*, 150 Mass. 394; 23 N. E. Rep. 51.

⁶ *Taylor v. Com.*, 18 S. W. Rep. 852 (Ky., 1892).

⁷ *State v. Horne*, 9 Kan. 119; *State v. Johnson*, 72 Iowa, 393; *State v. Kohn*, 9 Nev. 179. Where the accused denies on the witness stand that he wrote an instrument in issue, he may be compelled on cross-examination to write the same words on paper. *United States v. Mullaney*, 32 Fed. Rep. 730.

⁸ *People v. Brown*, 72 N. Y. 571; *Hanoff v. State*, 37 Ohio St. 178.

In conclusion it may be said that it is usually provided by statute that the failure of the accused to testify must not be considered as a circumstance against him, nor can it be alluded to or commented on by counsel. Under such a statute it is the duty of the court to charge that the defendant's silence creates no presumption of his guilt.¹ A strict compliance with such a statutory provision is usually required. So the prosecuting attorney will not be allowed to evade this requirement that he shall keep silence as to the defendant's failure to testify by calling the attention of the jury to the fact that none of the neighbors of the defendant in a trial for the murder of his wife was informed by him how the latter came to her death,² or by stating to the jury that if the defendant fails to testify the law forbids the state to comment upon his failure to do so.³ But if the accused goes upon the stand and testifies to any particular fact, the state may call attention to his silence regarding or his failure to deny certain other facts concerning which he must have had personal knowledge;⁴ and if, after commenting on the failure of defendant to testify at all, the district attorney withdraws his remarks and the judge instructs the jury that defendant's failure to testify must not be considered, the error is cured.⁵

¹ *Fulcher v. State*, 13 S. W. Rep. 750; 28 Tex. App. 465; *State v. Ice*, 34 W. Va. 244; 12 S. E. Rep. 695; *Staples v. State*, 14 S. W. Rep. 603; 89 Tenn. 231; *People v. Doyle*, 53 Hun, 535; *McFadden v. State*, 28 Tex. App. 241; *Sutton v. Com.*, 85 Va. 128; *State v. Mathews*, 98 Mo. 125; *State v. Tenison*, 22 Pac. Rep. 429; 42 Kan. 302; *People v. Rose*, 52 Hun, 35; *Watt v. People*, 126 Ill. 9; *Nelson v. Harrington*, 72 Wis. 591; 40 N. W. Rep. 228; *Quian v. People*, 15 N. E. Rep. 46; 123 Ill. 333. In *Ruloff v. People*, 45 N. Y. 213; *Austin v. People*, 102 Ill. 261; *State v. Weddington*, 103 N. C. 364;

and *Com. v. Hanley*, 140 Mass. 457, it was held that any allusion by the court in its charge to the fact that the defendant has not testified is error.

² *State v. Moxley*, 14 S. W. Rep. 969; 15 id. 556; 102 Mo. 374.

³ *Jordan v. State*, 16 S. W. Rep. 543; 29 Tex. App. 449.

⁴ *State v. Walker* (Mo., 1888), 9 S. W. Rep. 646; *Cotton v. State*, 87 Ala. 103; *Lee v. State* (Ark., 1892), 19 S. W. Rep. 6. *Contra*, *State v. Graves*, 95 Mo. 510.

⁵ *People v. Hess*, 85 Mich. 128; 48 N. W. Rep. 181; *State v. Chisnell* (W. Va., 1892), 15 S. E. Rep. 412.

CHAPTER XXIV.

IMPEACHMENT OF WITNESSES.

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| <p>§ 347. Party cannot impeach his own witness.</p> <p>348. Exceptions to the rule that a party vouches for his own witnesses.</p> <p>349. How the adverse witness may be impeached — General reputation for veracity, etc.</p> <p>350. Impeachment by proving contrary statements or silence of witness on a former occasion.</p> <p>351. <i>Falsus in uno falsus in omnibus.</i></p> | <p>§ 352. Evidence of general reputation of an impeached witness.</p> <p>353. Privileges of witnesses — Questions disclosing pecuniary liability.</p> <p>354. Questions tending to disgrace the witness.</p> <p>354a. Questions calculated to expose the witness to a criminal charge.</p> <p>354b. Bias and prejudice of the witness.</p> |
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§ 347. **Party cannot impeach his own witness.**— The word “impeach,” when employed in connection with the examination of a witness in court, has a twofold application, because of which some ambiguity may arise. When used in connection with the witness himself,— as, for example, in the phrase to impeach one’s own witness,— it means to attempt to prove him unreliable or unworthy of belief. On the other hand, when employed in connection with the evidence of the witness, or more strictly speaking in connection with the credit to be given his evidence, its meaning is to disparage, destroy or render useless. A party will not be permitted, as a general rule, to impeach the veracity and credibility of any witness that he calls in his own behalf. It is very reasonable to presume that he is well acquainted with the character and previous life of his witnesses and that he knows whether they are habitually truthful or not. But this rule and its exceptions should be qualified by the statement that it is only applicable to impeaching testimony which shows, first, that the character of the witness for truthfulness is bad; second, that he has made contradictory statements out of court; or, third,

to contradicting him solely with a view to impeach him and not incidentally in proving other acts referred to.¹ For it is well settled that a party is not to be enjoined from proving any relevant fact by a witness because his testimony to that fact directly contradicts, and thus discredits necessarily, the testimony of another of the party's witnesses to that or to some other relevant fact. Nor is it material that the general effect of such a conflict of evidence is to prove that either one or the other of the witnesses was wholly unworthy of confidence or belief.² Where a party, in cross-examining, makes his adversary's witness his own by going into matters outside of the examination-in-chief of the witness, he will not then be allowed to impeach him,³ but the party who originally called the witness may.⁴ In the absence of a statute to the contrary, where a party summons his adversary as a witness he vouches for his credibility.⁵ This rule has, however, been abrogated by statute in some of the states, and the party calling the adverse party may examine and impeach him as

¹ *Chester v. Wilhelm*, 111 N. C. 314; *Pollock v. Pollock*, 71 N. Y. 137; *Cross v. Cross*, 108 id. 629; *National Syrup Co. v. Carlson*, 42 Ill. App. 178; *Snodgrass v. Com.*, 17 S. E. Rep. 238; *Chism v. State* (Miss., 1893), 12 S. Rep. 852; *Thalheimer v. Klapetzy*, 59 Hun, 619; *Eastern Lum. Co. v. Gill*, 9 Pa. Co. Ct. R. 630; *Dixon v. State*, 86 Ga. 754; *Artz v. Chicago R. R. Co.*, 44 Iowa, 284. "By calling him to testify the party represents his witness as worthy of credit, or at least as not wholly unworthy of credit. For him to attack the veracity of the witness would be bad faith towards the court and give power to destroy the witness if unfavorable and to make good if favorable. Hence while a party may contradict incidentally he cannot ordinarily impeach his witness." *United States v. Watkins*, 3 Cranch C. C. 442; 1 Greenl. on Ev., §§461, 462; *Sheppard v. Yocum*, 10 Oreg. 410.

² *McFarland v. Ford*, 32 Ill. App. 173; *Cross v. Cross*, 108 N. Y. 629; *Lawrence v. Barker*, 5 Wend. 305; *Cowden v. Reynolds*, 12 S. & R. 281; *Moffatt v. Terney*, 30 Pac. Rep. 348; 17 Colo. 189; *Cross v. Cross*, 108 N. Y. 629; *Hollingsworth v. State*, 79 Ga. 603; *Warren v. Gabriel*, 51 Ala. 235; *Pollock v. Pollock*, 71 N. Y. 137; *Hall v. Houghton*, 37 Me. 411; *Chester v. Wilhelm*, 111 N. C. 314; *Seavy v. Dearborn*, 19 N. H. 351; *Coulter v. Amer. Exp. Co.*, 56 N. Y. 585; *Edwards v. Crenshaw*, 30 Mo. App. 510.

³ *Hill v. Froehlick*, 14 N. Y. S. 610.

⁴ *Pickard v. Bryant*, 52 N. W. Rep. 788; 92 Mich. 430; *Smith v. Utesch* (Iowa, 1892), 53 N. W. Rep. 343.

⁵ *Good v. Knox* (Vt., 1892), 23 Atl. Rep. 520; *Bensberg v. Harris*, 46 Mo. App. 404; *Tarsney v. Turner*, 48 Fed. Rep. 818; *Graves v. Davenport*, 50 Fed. Rep. 881; *Dravo v. Fabel*, 132 U. S. 487.

though he were testifying in his own behalf.¹ But the statutory right to call a party as a witness does not, alone and by implication, confer the right to impeach him.²

§ 348. Exceptions to the rule that a party vouches for his own witnesses.—If the witness is one that the law thrusts on the party, he is not, strictly speaking, his own witness, and the party does not vouch for his truthfulness. So where a subscribing witness is called to testify to the execution of a deed or a will, the party who is under the necessity of calling him is not concluded by his answers, and may impeach his character for veracity, or prove the execution by another witness in case he denies it.³ Again, the claims of a party should not be sacrificed or defeated out of consideration for a treacherous witness who, when placed upon the stand, intentionally misrepresents the facts or states them differently from what he had previously told the party out of court. The witness may have been, or may be now, in the secret employment or under the control of the adverse party, and he may have made the extra-judicial statements for the purpose of being called, as a witness, intending to confound the party calling him by his hostile testimony.

¹Crocker v. Agenbrod, 122 Ind. 585; Schmidt v. Durnham (Minn., 1892), 52 N. W. Rep. 277; Ga. Stat., Act Oct. 14, 1891; Landford v. Jones, 18 Ore. 307; 22 Pac. Rep. 1064; De Meli v. De Meli, 120 N. Y. 485; Webber v. Jackson (Mich., 1890), 44 N. W. Rep. 591; Helms v. Green, 105 N. C. 251. The evidence of an adverse party, taken before trial for his opponent's use, may be impeached at the trial. Crocker v. Agenbrod, 122 Ind. 585. *Of.* Miller v. Cook, 124 id. 101. Where the statute permits the testimony of the adverse party to be impeached by "adverse testimony," his credibility and reputation cannot be attacked directly. Helms v. Green, 105 N. C. 251. A party does not lose his right to impeach an adverse witness by recalling him with the sole object of

laying a foundation for his impeachment. Bennett v. State, 28 Tex. App. 359.

²Good v. Knox, 23 Atl. Rep. 520; 64 Vt. 97.

³Orser v. Orser, 24 N. Y. 51; Seminary v. Calhoun, 25 N. Y. 422; Sharey v. Hursey, 32 Me. 579; Peck v. Cary, 27 N. Y. 9; Thornton v. Thornton, 39 Vt. 122; Foster v. Dickinson, 64 id. 233; Crocker v. Agenbrod, 122 Ind. 587; Freer v. Williams, 7 Baxt. 550, 556; Edwards v. Crenshaw, 30 Mo. App. 510; Hildreth v. Aldrich, 15 R. I. 63; Mays v. Mays (Mo., 1893), 21 S. W. Rep. 921; Martin v. Perkins, 56 Miss. 204; Brown v. Bellows, 4 Pick. 179; Whitaker v. Galesburg, 15 id. 544; Garrison v. Garrison, 15 N. J. Eq. 266; Turner v. Cheesman, 15 id. 243; Williams v. Walker, 2 Rich. Eq. 291;

In spite of some uncertainty, the current of the decisions now sustains the proposition that a party may show that the evidence of such a witness has taken him wholly by surprise,¹ and he may then proceed to impeach its credibility. So the party may show by questioning the witness that the latter has been or is under the influence of his opponent, and he may be asked if he has made contradictory statements out of court.²

In many of the states it is enacted by statute that, if a hostile witness denies that he has made contradictory statements, a party may show by other witnesses that the witness has made prior statements inconsistent with his testimony. These statutes being in derogation of the common law must be strictly construed.³ So the circumstances of time and place under which the contradictory statements were made must be particularly described to the witness, it not being sufficient merely to ask him if he has not made inconsistent statements to some particular person.⁴ Where one to lay a foundation for a charge of fraud introduces a writing as evidence, the rule that a party vouches for his witness is not applicable, as in

Deffenderfer v. Scott, 32 N. E. Rep. 87; *Goodtitle v. Clayton*, 4 Burr. 3224; *Scribner v. Crane*, 2 Paige, 147. Evidence of the bad character of a subscribing witness was rejected in *Boylan v. Meeker*, 4 Dutch. 275.

¹ *National Syrup Co. v. Carlson*, 42 Ill. App. 178; *Williams v. State*, 25 Tex. App. 176; *McNerney v. Reading*, 150 Pa. St. 611; 30 W. N. C. 534. The fact that a witness on the stand appears wholly ignorant of the facts in issue or fails to testify as was expected does not, unless he gives hostile evidence, permit the party examining to show that he made the desired statements out of court or that he professed to have a competent knowledge of the matter. *Chism v. State* (Miss., 1893), 12 S. Rep. 852; *People v. Mitchell*, 94 Cal. 550; 29 Pac. Rep. 1106.

² *Davis v. State* (Tex., 1893), 21 S. W. Rep. 369; *Bullard v. Pearsall*, 53

N. Y. 230; *Rice v. N. E. Ins. Co.*, 4 Pick. 439; *Brown v. Bellows*, 4 id. 179; *Hurlbut v. Hurlbut*, 63 Vt. 667; *Bank of Northern Liberties*, 6 W. & S. 285; *Adams v. Wheeler*, 97 Mass. 67; *Coulter v. American Express Co.*, 56 N. Y. 585; *People v. Jacobs*, 49 Cal. 384; *State v. Sorter* (Kan., 1893), 34 Pac. Rep. 1036; *Gardner v. Connelly*, 75 Iowa, 205. But it has been held that the answer of the witness is conclusive on the party. *Hall v. Railroad Co.*, 51 N. W. Rep. 150 (Iowa, 1892).

³ *Williams v. State* (Tex., 1898), 7 S. W. Rep. 661; *Hemingway v. Garth*, 51 Ala. 530; *Blackburn v. Com.*, 12 Bush, 181; *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 id. 433; *Newell v. Homer*, 120 id. 277.

⁴ *Com. v. Thyng*, 134 Mass. 191; *People v. Bushton*, 80 Cal. 161. See *ante*, § 342.

such a case there is no witness and he may therefore discredit it subsequently.¹

In general, the intention to impeach a witness is to be ascertained rather from the actual purpose of the question than from its mere form. Thus, a question to one's own witness whether he has not testified differently at a former trial is not inadmissible where its sole purpose is to refresh the recollection of the witness, not to impeach him.²

In conclusion it may be said that the rule against impeaching one's own witness does not apply after the adverse party has called the witness to testify in his behalf against the party who first called him.³

§ 349. How adverse witness may be impeached — General reputation for veracity, etc.— The credibility of a witness who has been examined in chief may be impeached not only by contradicting the facts as stated by him in his evidence by other witnesses, but by evidence directly tending to destroy his general reputation for truthfulness. In impeaching the general reputation of a witness for veracity it is proper to ask the impeaching witness, who ought to be called from among persons resident near the witness whose reputation is under consideration,⁴ whether he knows the general reputation of

¹ *Henry Buggy Co. v. Pratt*, 73 Iowa, 485; 35 N. W. Rep. 587; *Bunce v. Gallagher*, 5 Blatch. 481.

² *Louisville & N. R. Co. v. Hurt* (Ala., 1893), 13 S. Rep. 130. A party who, to avoid a continuance, admits the facts to which an absent witness will testify is thereby precluded from impeaching him. *North Chicago St. R. Co. v. Cottingham*, 44 Ill. App. 46; *Powers v. State*, 80 Ind. 77. If, however, he only admits that the witness will testify as it is alleged he will, he may impeach him, though he is absent. *State v. Swain*, 68 Mo. 605.

³ *Pickard v. Bryant* (Mich., 1892), 52 N. W. Rep. 788; *Smith v. Utisch* (Iowa, 1892), 52 N. W. Rep. 343. But cf. *Richards v. State* (Wis., 1892), 51 N. W. Rep. 652.

⁴ *Redden v. Tefft* (Kan., 1892), 29 Pac. Rep. 157; *Louisville, N. A. etc. Co. v. Richardson*, 66 Ind. 43; *Healey v. Terry*, 9 N. Y. S. 519; *State v. Johnson*, 41 La. Ann. 574; *People v. Markham*, 64 Cal. 157. This rule applies in a prosecution for crime when the accused testifies in his own behalf. *State v. Rugan*, 5 Mo. App. 592; *State v. Beal*, 68 Ind. 345; *Mershon v. State*, 51 Ind. 14. So the reputation must be recent. *Sun Fire Office v. Ayerst*, 55 N. W. Rep. 635. But evidence of bad reputation two or more years before the trial is competent, as no presumption exists that a person of mature age would by reformation acquire a good reputation in that period. *Mynatt v. Hudson*, 66 Tex. 66; *Davis v. Com.* (Ky., 1893), 23 S. W. Rep. 585. "It has been

A. and what that reputation is. So the witness may also be asked whether from what he knows of him and from his reputation he would believe A. under oath.¹ But the fact that a witness fails to state that he would not believe the witness under oath will not prevent the introduction of evidence of the bad reputation of the witness.²

The question whether the witness would, from his knowledge of the party, believe him under oath was excluded by the earlier American cases as calling for the expression of a conclusion or opinion by a non-expert witness. It was considered as an unwarranted departure from the established rules of law, as tending to permit the prejudice and personal bias of a witness to infect the minds of the jurors and as invading their province as triers of the facts.³ But the existence of a person's reputation, *i. e.*, what the community in which he resides says of him, is a fact which any witness may prove who has learned the reputation from what he hears. "What

said that the regular mode of examining a witness is to inquire whether he knows the general *character* of the person whom it is intended to impeach. In all such cases the word 'character' is used as synonymous with 'reputation.' What is wanted is the common opinion in which there is general concurrence; in other words, general reputation or character attributed; that is presumed to be indicative of actual character." *Knobe v. Williamson*, 17 Wall. 588.

¹ *Mayes v. State* (Tex., 1893), 24 S. W. Rep. 421; *State v. Boswell*, 2 Dev. 209, 211; *Hudspeth v. State*, 50 Ark. 534; *Ford v. Ford*, 7 Humph. 92; *People v. Mather*, 4 Wend. 257, 258; 1 Hill (S. C.), 258; *Wetherbee v. Norris*, 103 Mass. 565; *State v. Christian*, 44 La. Ann. 950; *Hamilton v. People*, 29 Mich. 173; *Nelson v. State* (Fla., 1893), 13 S. Rep. 361; *Lyman v. Philadelphia*, 56 Pa. St. 483; *People v. Tyler*, 35 Cal. 553; *National Bank v. Scriven*, 63 Hun. 375; *Eason v. Chapman*, 21 Ill. 35; *State v. Johnson*, 40 Kan. 266; *Keator v.*

People, 32 Mich. 484. *Contra*, *King v. Peakman*, 20 N. J. Eq. 316; *Griffin v. State*, 26 Tex. App. 157; *Marshall v. State*, 5 Tex. App. 273. "Unwillingness to believe a man under oath must be based upon two facts—that the witness knows the reputation for veracity among the man's neighbors and that such reputation is bad." *Spies et al. v. People*, 122 Ill. 208. It is error to instruct the jury that they may rely upon their personal knowledge of the character of the witnesses. *Chattanooga, etc. Co. v. Owen* (Ga., 1893), 15 S. E. Rep. 853. See § 343, *ante*.

² *Mitchell v. State*, 94 Ala. 68; 10 S. Rep. 518. The fact that a witness accepted a very small sum of money in satisfaction of a slanderous accusation of perjury made against him may be given in evidence to show that he estimates his own reputation at a low figure. *Bird v. Hudson* (N. C., 1893), 16 S. E. Rep. 209.

³ *Phillips v. Kingfield*, 1 Appleton, 375.

the witness has heard is the reputation."¹ If, however, such evidence be regarded as an opinion, then it is admissible on the same ground as are opinions of a person's sanity, temper, etc. The impeaching witness cannot be permitted to testify to the commission of any specific acts of untruthfulness or other bad conduct.² He will be required to confine his evidence strictly to showing the reputation of the witness, not his actions;³ for it is admitted that no man can with fairness be called upon, without notice, to defend his particular actions, perhaps long since forgotten by him.⁴ The impeaching witness need not be personally acquainted with the witness,⁵ and he may be cross-examined to ascertain how he acquired the knowledge on which his opinion is based or his general character for truthfulness may in turn be attacked.⁶ By some of the cases evidence of this sort is confined to proving the good or bad reputation of the witness for veracity alone,⁷ and if the witness has no knowledge upon that point he is wholly incompetent to testify.⁸ But elsewhere greater latitude is per-

¹ Cooley, J., in *Bathrick v. Detroit P. & T. Co.*, 50 Mich. 652.

² *State v. Rogers* (Mo., 1892), 18 S. W. Rep. 976; *Rattarré v. Chapman*, 79 Ga. 574; *People v. O'Brien*, 96 Cal. 371; *Davey v. Lohrman*, 20 N. Y. S. 675; *Mentze v. Tuteur*, 77 Wis. 236; *Smith v. State*, 88 Ala. 73; *People v. Ryan*, 55 Hun, 214; *Com. v. Fox* (Ky., 1890), 1 S. W. Rep. 396.

³ *Mentze v. Tuteur*, 77 Wis. 236; 46 N. W. Rep. 123; *Clink v. Gunn* (Mich., 1892), 51 N. W. Rep. 193; *Moreland v. Lawrence*, 23 Minn. 84; *Smith v. State*, 88 Ala. 73; *Fox v. Com.* (Ky., 1891), 1 S. W. Rep. 396; *Randall v. State*, 132 Ind. 539; *Conley v. State*, 85 N. Y. 618; *Dimick v. Downs*, 82 Ill. 570.

⁴ "All the cases agree that the inquiry must be restricted to his general reputation for truthfulness or to his general character, and that it cannot be extended to particular facts or transactions, for the reason that while every man is supposed to

be fully prepared to meet those general inquiries, it is not likely he would be prepared, without notice, to answer as to particular acts." *Tees v. Huntingdon*, 23 How. 11-13.

⁵ *State v. Turner*, 36 S. C. 534.

⁶ *State v. Perkins*, 66 N. C. 126; *Nelson v. State* (Fla., 1893), 13 S. Rep. 861. If a party, to impeach his adversary's witness, offers evidence which impeaches his own witness, he should not be allowed to endeavor to rebut it. *Mealer v. State* (Tex., 1893), 22 S. W. Rep. 142.

⁷ *Spears v. Forrest*, 15 Vt. 435; *State v. Clawson*, 30 Mo. App. 139; *Kennedy v. Shaw*, 66 Tex. 442; *Briggs v. Com.*, 82 Va. 554; *Bates v. Barber*, 4 Cush. 107; *State v. Jackson*, 44 La. Ann. 160; *Sleeper v. Van Middlesworth*, 4 Denio, 431; *People v. Abbott* (Mich., 1893), 56 N. W. Rep. 862.

⁸ *Healey v. Terry*, 9 N. Y. S. 519; *State v. Coffey*, 44 Mo. App. 455; *Com. v. Lawler*, 12 Allen (Mass.),

mitted, and it is held that evidence may be given involving the whole moral character of the person whose evidence is impeached, on the theory that where a person is shown to have been addicted to a vicious habit of living, indicating great moral turpitude, it is a very fair inference that his character for truthfulness is also bad and that he would perjure himself if it was to his interest to do so.¹

§ 350. Impeachment by proving contrary statements or silence of witness on a former occasion.—"Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it. The same course may be taken with a witness upon his examination in chief if the judge is of opinion that he is adverse (*i. e.*, hostile) to the party by whom he was called and permits the question."²

585; *State v. Jackson* (La., 1892), 10 S. Rep. 600; *State v. Perkins*, 66 N. C. 126; *Holmes v. State*, 88 Ala. 29; *Redden v. Teft* (Kan., 1892), 29 Pac. Rep. 157. A party is not precluded from offering cumulative evidence of bad character because he has already impeached the character of a witness. *Browder v. State*, 30 Tex. App. 614; 18 S. W. Rep. 197.

¹ *McTyler v. State* (Ga., 1893), 18 S. E. Rep. 140; *Pierce v. Newton*, 13 Gray, 528; *Gilliam v. State*, 1 Head, 38; *Eason v. Chapman*, 21 Ill. 33; *State v. Miller*, 98 Mo. 263; *State v. Boswell*, 2 Dev. (N. C.) 200, 210; *People v. Webster* (N. Y., 1893), 34 N. E. Rep. 730; *State v. McClintick*, 73 Iowa, 603; *People v. Harrison*, 53 N. W. Rep. 725; 93 Mich. 594; *Crump v. Com.* (Ky., 1893), 20 S. W. Rep. 390; *Winter v. Cent. Iowa R. Co.*, 45 N. W. Rep. 737; *Hollingsworth v. State*, 53 Ark. 387; *Mitchell v. State*, 94 Ala. 68; 10 S. Rep. 518;

State v. Raven (Mo., 1893), 22 S. W. Rep. 376. A male witness cannot be impeached by proof of his general reputation for unchastity. *State v. Coffey*, 44 Mo. App. 455. The fact that a female witness is a prostitute may be shown by her own admissions on the stand or by independent evidence; but, while the testimony of such witnesses should be closely scrutinized by the jury, they should not be disbelieved on account of their bad character for unchastity if otherwise credible. *People v. Mills*, 94 Mich. 630; *Paul v. Paul*, 37 N. J. Eq. 25. Nor should evidence that a witness has been fined in an inferior court be received to impeach his character where it is not shown that he committed any offense which is immoral *per se*. *Goode v. State* (Tex., 1893), 24 S. W. Rep. 102.

² *Stephen's Dig. Ev.*, art. 131. See *ante*, § 336.

In order to impeach a witness by proof that he has made contradictory statements out of court, it is always necessary in fairness to him to lay a foundation by first asking him upon his cross-examination, clearly and distinctly, whether he did or did not at some particular time and place and in the presence of or to some particular person make such statements.¹ By having his attention directly called to the particular cir-

¹ This rule was so thoroughly discussed in the Queen's Case, 2 Brod. & Bing. 313, 314, that it is sometimes called "the rule in the Queen's case." But the court in that case only affirmed a principle which was already well recognized in the common law. The court says: "If the witness admits the words imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which in our opinion is the better course. If the witness denies the words imputed to him, the adverse party has an opportunity afterwards of contending that the matter is such that he is not bound by the answer, and his proof in contradiction will be received at the proper season." See, also, *Cohn v. Heimbauch* (Wis., 1893), 56 N. W. Rep. 638; *Com. v. Mosier*, 135 Pa. St. 221; *Bruce v. State*, 21 S. W. Rep. 681; 31 Tex. Cr. App. 590; *State v. Turner*, 15 S. E. Rep. 602; 36 S. C. 534; *McCulloch v. Doleson*, 133 N. Y. 114; *Zebbley v. Storey*, 117 Pa. St. 478; *Spohn v. Mo. P. R. Co.* (Mo., 1893), 22 S. W. Rep. 690; *State v. Jones*, 44 La. Ann. 960; *State v. Calligan*, 41 La. Ann. 574, 578; *Jones v. State*, 65 Miss. 179; *State v. M'Laughlin*, 44 Iowa, 82; *Kent v. State*, 42 Ohio

St. 429; *State v. Glynn*, 51 Vt. 577; *Hanscom v. Burmood*, 35 Neb. 504; *Bonnelli v. Bowen* (Miss., 1893), 11 S. Rep. 791; *Greer v. Higgins*, 20 Kan. 420; *State v. Baldwin*, 36 id. 1; *State v. Davis*, 29 Mo. 391; *St. Louis, I. M. & S. R. Co. v. Swelt* (Ark., 1893), 21 S. W. Rep. 587; *Jackson v. Swope* (Ind., 1893), 33 N. E. Rep. 909; *Wright v. Hicks*, 15 Ga. 160; *State v. Hunsaker*, 16 Oreg. 497; *Morris v. Atl. Ave. R. R. Co.*, 116 N. Y. 556; *Diffenderfer v. Scott* (Ind., 1893), 32 N. E. Rep. 87; *Hughes v. Ward*, 38 Kan. 452; *Hammond v. Dike*, 42 Minn. 273; *Babcock v. People*, 13 Colo. 515; *Klug v. State*, 77 Ga. 734; *Koehler v. Buhl*, 94 Mich. 496; *Bock v. Wygant*, 5 Ill. App. 643; *State v. Wright*, 75 N. C. 439; *Root v. Borst*, 65 Hun. 622; *State v. Parker*, 96 Mo. 382. The witness may be contradicted by his testimony given on a prior trial of the same case if he asserts that his present testimony is the same as that previously given (*Hudson v. State*, 28 Tex. App. 323; *Bennett v. Syndicate Ins. Co.*, 43 Minn. 48; *Brown v. State*, 76 Ga. 623), and he should be allowed to explain the contradiction. *State v. Reed*, 62 Me. 129. Cf. *Toplitz v. Hedden*, 146 U. S. 252; *Phifer v. Erwin*, 100 N. C. 59; 6 S. E. Rep. 672. A question whether the witness had not made a contradictory statement "last July" is sufficiently definite as to time. *State v. Walters* (Wash., 1893), 34 Pac. Rep. 938, 1098.

cumstances under which his alleged inconsistent declaration was made, he is not taken unfairly by surprise, but, his memory refreshed by these facts, he may be able to show that he was innocently mistaken or that he was misunderstood, or he may explain away the seeming inconsistency of his statements by showing their true relation, meaning and purpose.

Where a witness, when asked if he made certain contradictory statements, declares he does not remember making them, evidence may be adduced to show that he made them,¹ without further foundation for their introduction.² Whether the witness denies making the contradictory statement or declares that he does not remember it, the question asked the witness who is called to impeach him should be the same as respects the time, place and substance of the contradictory statement as the question put to the original witness. The question also should be so shaped as to admit of "yes" or "no" for an answer.³ If the witness is a party, his contradictory statements are admissible as direct evidence and not merely as impeaching evidence. Hence it is not necessary to lay a foundation for their introduction if the party has, in the course of the trial, a full opportunity to testify.⁴

The rule as above stated is equally applicable whether the evidence to be impeached is oral and given *viva voce* in open court or is contained in a deposition;⁵ but in the case of affidavits and depositions, which are generally formal in their phraseology, the considerations pointed out by Lord Langdale⁶ should never be lost sight of. In the case cited the unfairness of comparing an affidavit made out of court by one

¹ Smith v. State (Tex., 1893), 20 S. W. Rep. 554; Heddles v. Chicago, etc. Co., 77 Wis. 228; Levy v. State, 28 Tex. App. 203; Payne v. State, 60 Ala. 80; Billings v. State, 52 Ark. 303. Cf. Mayer v. Stone, 21 Neb. 717.

² Fuller v. State, 30 Tex. App. 559; 17 S. W. Rep. 1108.

³ Pence v. Waugh (Ind., 1894), 34 N. E. Rep. 860.

⁴ Meyer v. Campbell, 20 N. Y. S. 705; 1 Misc. Rep. 283; Rose v. Otis (Colo., 1893), 31 Pac. Rep. 493; Milli-

gan v. Butcher, 37 N. W. Rep. 596; 22 Neb. 523; King v. State, 77 Ga. 734; Young v. Bradley, 94 Cal. 128; Lewis v. State (Ga., 1893), 16 S. E. Rep. 986.

⁵ Gilyard v. State (Ala., 1893), 13 S. Rep. 891; United States v. Taylor, 35 Fed. Rep. 484; Hammond v. Dike, 42 Minn. 273; Tabor v. Judd, 62 N. H. 288; Marx v. Strauss, 90 Ala. 453; Leiber v. Railroad Co. (Iowa, 1892), 50 N. W. Rep. 547.

⁶ In Johnston v. Todd, 5 Beav. 600.

who is unskilled in or ignorant of the proper use of language with his subsequent spontaneous replies in oral examination in open court is pointed out. In such a case the language of the affidavit is not his; and though it may have been read to him before he signed it by the person whom he trusted to voice his ideas in proper form, he may totally misunderstand the meaning of a writing couched in such unusual and often technical language. These considerations, together with the agitation and hurry of a cross-examination, and the trickery and intimidation too often practiced upon ignorant witnesses, go far to render any comparison which is made between the testimony of a witness taken in open court and his prior affidavit very misleading and unreliable.¹

Where the contradictory statement is a writing the counsel is bound, if he intends to contradict the witness, to show the writing to the witness and ask him if he wrote it, or call his attention to the part contradictory of his evidence.² If he admits that he wrote it, the whole must then be read to him as the best evidence of what is contained in it. The witness cannot be asked whether he made certain statements in the letter unless the whole of it is read.³ Sometimes a portion of

¹ Johnston v. Todd, 5 Beav. 600, 602, cited 1 Greenl. on Ev., § 462.

² Foster v. Worthington, 146 Mass. 607; Perishable Freight T. Co. v. O'Neill, 41 Ill. App. 423; Maxted v. Fowler, 94 Mich. 106; People v. Ching, 74 Cal. 389; Weymouth v. Broadway, etc. Co., 2 Misc. R. 506; Gunter v. State, 83 Ala. 96; State v. Crow, 107 Mo. 341; Robinson v. State, 124 Ill. 366. A deposition when it is offered at a trial cannot be impeached by an earlier deposition containing contradictory statements, though on account of the death of the witness it is impossible to lay a foundation by calling his attention to them. Eppert v. Hall (Ind., 1893), 31 N. E. Rep. 74. *Contra*, Thompson v. Gregor, 11 Colo. 531. On the other hand it has been held that the evidence of absent witnesses, which has

been committed to writing and admitted by consent, is open to contradiction if its truth is not also admitted, to the same extent as though the witness had testified *viva voce* in open court, even though no foundation can be laid. United States v. Taylor, 35 Fed. Rep. 484.

³ Dunbar v. McGill, 69 Mich. 297; Richmond v. Sundborg, 77 Iowa, 258; § 32. Where it is attempted to impeach a witness by his inconsistent statements made on the preliminary examination of the prisoner, his testimony, if in writing, should be shown to him and the inconsistencies pointed out. State v. Carden, 84 Ala. 217; Simmons v. State (Ala., 1893), 13 S. Rep. 896. It may then be read or as much of it as the witness denies. State v. Jones, 29 S. C. 201.

a writing may be shown to the witness and the question put to him, Did you write that? He cannot, however, be examined upon writing at all if he denies that he is the author of that part, nor can the attorney for the adverse party examine the paper.¹

Where a witness is asked if he has not made a contradictory statement out of court in regard to some matter which is wholly irrelevant to the issue and he replies that he has not, his answer is conclusive, and he cannot in the absence of a statute be contradicted by the party cross-examining him.² If a witness is proved to have made contradictory statements out of court, questions on re-examination to show that he has made other statements consistent with his testimony are not universally considered allowable,³ though where, because of relationship to the party or to the subject-matter of the

¹ The Queen's Case, 2 B. & B. 288. The English rule is thus laid down by Sir James Stephen: "A witness under cross-examination (or a witness whom the judge has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony) may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him (or being proved in the first instance); but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may at any time during the trial require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit." Dig., art. 132. Contradictory statements are not admissible to impeach a deposition where the attention of the witness was not called to

them when his deposition was taken. *Fitch v. Kennard*, 19 N. Y. S. 468.

² *Jones v. Lumber Co.* (Ark., 1893), 23 S. W. Rep. 679; *Union P. R. Co. v. Reese*, 56 Fed. Rep. 288; *Carter v. State* (Neb., 1893), 54 N. W. Rep. 853; *Hill v. State* (Tenn., 1892), 19 S. W. Rep. 674; *Second Nat. Bank v. Wenzel*, 151 Pa. St. 142; *Murphy v. Com.*, 18 N. Y. S. 353; 28 Abb. N. C. 207; *State v. Morris*, 109 N. C. 820; *Murphy v. Com.*, 23 Gratt. (Va.) 960; *Com. v. Buzzell*, 16 Pick. 157; *Com. v. Jones*, 155 Mass. 170; 29 N. E. Rep. 467; *Phila. etc. Co. v. Stimpson*, 14 Peters, 461; *Harris v. Wilson*, 7 Wend. 57; *Lake Erie, etc. Co. v. Morain*, 29 N. E. Rep. 869; 36 Ill. App. 862.

³ *Davis v. Graham* (Colo., 1892), 29 Pac. Rep. 1007; *Robb v. Hackley*, 23 Wend. 50; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *People v. Doyell*, 48 Cal. 85; *Fallin v. State*, 83 Ala. 5; *State v. Flint*, 60 Vt. 304; *Smith v. Morgan*, 38 Me. 468; *Maitland v. Bank*, 40 Md. 540; *Williams v. State*, 24 Tex. App. 637; *Railroad Co. v. Davis*, 1 Gray, 88; *Connor v. People* (Colo., 1893), 33 Pac. Rep. 159;

cause, it is sought on cross-examination to show that the witness is strongly biased, the party calling him may show that before the relationship existed he made a similar statement to what he has testified to on his direct examination.¹ Sometimes it is attempted to impeach a witness as regards particular matters testified to by him by showing that he was silent or that he concealed his knowledge of such facts on a prior occasion when he might naturally have been expected to speak.

That a witness on a second trial recollects a material fact which he did not testify to on the first trial is a suspicious circumstance in itself. The fact that he withheld testimony of that fact, or denied that he possessed any knowledge of it, is never conclusive of the unreliability of his later testimony; for he may be permitted to explain the reasons of his previous denial, silence or real or assumed forgetfulness and ignorance. Thus it may be shown that the occasion of his previous silence was a judicial proceeding at which he was not questioned on the matter at all,² or that his prior statements were unintentionally omitted from the record of the first trial;³ that he actually forgot the facts,⁴ or suppressed them through fear,⁵ or that his silence or concealment was in good faith and prompted by correct motives.⁶

§ 351. *Falsus in uno falsus in omnibus.*—The principle illustrated by the above maxim permits the inference to be drawn that because a witness is guilty of deliberate perjury

Loomis v. New York Cent. & H. R. R. R. Co. (Mass., 1893), 34 N. E. Rep. 82. *Contra*, *Bell v. State* (Tex., 1893), 20 S. W. Rep. 362; *Hobbs v. State* (Ind., 1893), 32 N. E. Rep. 1019; *Davenport v. McKee*, 98 N. C. 500; *State v. Rowe*, 98 N. C. 629; 4 S. E. Rep. 506; *Malonee v. Duff*, 72 Md. 283; 19 Atl. Rep. 708; *State v. McKinney*, 111 N. C. 683.

¹ *State v. Thomason*, 1 Jones (N. C.), 274; *Thompson v. State*, 38 Ind. 89; *Hotchkiss v. Gen. Ins. Co.*, 5 Hun (N. Y.), 101; *State v. Flint*, 60 Vt. 304; 14 Atl. Rep. 178; *Hewitt v. Carey*, 150 Mass. 445.

² *Babcock v. People*, 13 Colo. 515; *State v. Flint*, 60 Vt. 304; *Territory v. Clayton*, 8 Mont. 1; *Hyden v. State*, 20 S. W. Rep. 764; 31 Tex. Cr. Rep. 401; *Bickford v. Menier*, 9 N. Y. S. 775; *Cowan v. Third Ave. Ry. Co.*, 9 N. Y. S. 610.

³ *United States v. Ford*, 33 Fed. Rep. 861.

⁴ *State v. Turner*, 15 S. E. Rep. 602; 36 S. C. 534.

⁵ *People v. Chapleau*, 121 N. Y. 266; 24 N. E. Rep. 469.

⁶ *Bruce v. State*, 21 S. W. Rep. 602.

in one particular his testimony may be wholly discredited by the jury in other respects. The rule rejecting the evidence of witnesses who had been convicted of an infamous crime is largely based upon this principle, and the effect of the rule may be, according to circumstances, either to demolish the case of the party who is shown to have knowingly and deliberately perpetrated or connived at a falsehood, or its effect may be restricted to the testimony of the single witness guilty of perjury. It is therefore not error for the court to charge that the jury may disbelieve all the evidence of any witness whose evidence as to a material fact is impeached,¹ though if a false statement is made not wilfully but through misapprehension, inadvertence, mistake or forgetfulness, the entire testimony of the witness should not for this reason be disregarded.² But if the jury believe that the witness has wilfully and deliberately sworn falsely on any material point, they have the right, and it may be their duty, to disregard his evidence altogether,³ except, so far as it has been corroborated by other credible evidence or by the facts and circumstances which may be inferable from such evidence.⁴

¹ *Seligman v. Rogers* (Mo., 1893), 21 S. W. Rep. 94; *Clapp v. Bullard*, 23 Ill. App. 609.

² *Barney v. Dudley*, 40 Kan. 247; *Winter v. Cent. Iowa R. Co.* (Iowa, 1889), 45 N. W. Rep. 737; *Frazier v. State*, 19 S. W. Rep. 838; 56 Ark. 242; *Spencer v. Dougherty*, 23 Ill. App. 399; *Plyer v. German Am. Ins. Co.*, 121 N. Y. 689; *Murtaugh v. Murphy*, 30 Ill. App. 59.

³ *Winter v. Railroad Co.*, 80 Iowa, 443; *Seligman v. Rogers* (Mo., 1893), 21 S. W. Rep. 94; *Cole v. L. S. & M. S. R. Co.* (Mich., 1893), 54 N. W. Rep. 638; *Morgenthau v. Walker*, 21 N. Y. S. 936; *Judge v. Jordan*, 81 Iowa, 519; *Speight v. State*, 80 Ga. 512; *Clapp v. Bullard*, 23 Ill. App. 609; *People v. Petmecky*, 99 N. Y. 415; *Frazier v. State*, 56 Ark. 242; *State v. Beauleigh*, 92 Mo. 490; *Moett v. People*, 85 N. Y. 373; *Welke v. Welke*, 63 Hun, 625; *Jor-*

dan v. State, 81 Ala. 20; 1 S. Rep. 577; *Church v. Chicago, etc. Co.* (Mo., 1893), 23 S. W. Rep. 1056; *People v. O'Neill*, 109 N. Y. 251; 16 N. E. Rep. 68; *Dunn v. People*, 29 N. Y. 529.

⁴ *Lohr v. People*, 132 Ill. 504; *Reynolds v. Greenbaum*, 80 Ill. 416; *City of Sandwich v. Dolan*, 31 N. E. Rep. 416; 42 Ill. App. 53; *Hillman v. Schwenk*, 68 Mich. 293. In *The Santissima Trinidad*, 7 Wheat. 339, the court, per Story, J., said: "If the circumstances respecting which testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind rather than from deliberate error. But where the party

Whether or not a witness has been successfully impeached so that his credibility has been destroyed is a question over which the province of the jury or other tribunal having power to determine the facts is exclusive. They are not bound by any rule of law to disregard his evidence wholly, but may take it into consideration for what it is worth, together with all the evidence in the case; for though the witness may have been impeached on some material points, his evidence on others may be credible in itself or may be corroborated by other evidence which is credible.¹

§ 352. Evidence of the general reputation of an impeached witness.—The direct impeachment of a witness by any of the means which have been above explained creates an issue respecting his general character for truthfulness. Evidence to support this, and to show that he is a person in whose testimony the jury may have confidence, is therefore now relevant.² But evidence of reputation is not relevant merely because there is a contradiction between adverse witnesses,³ or because the credibility of a witness is shaken on his cross-examination,⁴ though its admission in such cases may not be reversible error.⁵

speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise it is extremely difficult to exempt him from the charge of deliberate falsehood, and the courts under such circumstances are bound, upon principles of law, morality and justice, to apply the maxim *falsus in uno falsus in omnibus*."

¹ Wimer v. Smith (Oreg., 1892), 30 Pac. Rep. 416; Surles v. State, 89 Ga. 167; Lyles v. Com. (Va., 1892), 13 S. E. Rep. 802; Kerr v. Hodge, 39 Ill. App. 546; Cent. W. H. Co. v. Sargent, 40 Ill. App. 438; People v. Wallace, 89 Cal. 158; State v. Patrick (Mo., 1892), 17 S. W. Rep. 666; Howell Lumber Co. v. Campbell (Neb., 1894), 57 N. W. Rep. 383; James v. Mickey, 26 S. C. 270;

Strauss v. Abraham, 32 Fed. Rep. 210; Plyer v. Ger. Am. Ins. Co., 121 N. Y. 689.

² Clem v. State, 33 Ind. 418; Surles v. State (Ga., 1892), 15 S. E. Rep. 38; State v. Cherry, 63 N. C. 493; Louisville, N. A. etc. Co. v. Frawley, 110 Ind. 26; George v. Picher, 28 Gratt. (Va.) 299; Griffith v. State, 26 Tex. App. 157; State v. Jones, 29 S. C. 201; 7 S. E. Rep. 296; Isler v. Dewey, 71 N. C. 14; Hadgo v. Gooden, 13 Ala. 718; Paine v. Tilden, 5 Washb. C. C. 554; Kennedy v. Upshur, 66 Tex. 442; Magee v. People (Ill., 1892), 28 N. E. Rep. 1077.

³ Saussy v. So. Flor. R. Co., 22 Fla. 327; Britt v. State, 21 Tex. App. 215; Diffenderfer v. Scott (Ind., 1893), 32 N. E. Rep. 87.

⁴ Stevenson v. Gunning, 64 Vt. 601.

⁵ Greene v. State (Tex., 1891), 12 S. W. Rep. 872.

A distinction has sometimes been made by which it has been held that general evidence of the character of the witness for truthfulness is not relevant if he was impeached merely by showing that he had made contradictory statements.¹ This distinction is repudiated by a majority of the decisions which support the proposition that general evidence of the character of the witness as a truthful person is always admissible whenever any attempt, though it may have been unsuccessful, has been made to impeach it;² as, for example, where another witness is asked what is his character for truth and replies that it is good.³

§ 353. Privileges of witnesses — Questions disclosing a pecuniary liability.—The question of the privilege of the witness from answering questions during his examination has a twofold aspect, so that the immunity which the witness enjoys may have for its object the protection either of the witness himself or the protection of some other person to whose interests he may be related in a confidential capacity. In the former class of cases, which we must now consider, the privilege is personal to the witness and consequently may be waived by him. It cannot be claimed by either party to the action if the witness chooses to waive it. In the latter class, in which are included confidential communications made to the witness in his professional capacity, the privilege cannot be waived by any one except the person who has made the communications.⁴

In England at the common law a considerable diversity of opinion existed upon the point whether a witness could claim the privilege of not answering a question which would tend merely to expose him to a civil liability or action or a pecuniary loss.⁵ In England and in some of the states the matter was regulated by statute at an early date,⁶ while in other states a precisely similar rule has been adopted by the courts,

¹ *Brown v. Mooers*, 6 Gray, 451. *Thornsberry* (Tex., 1892), 17 S. W. Rep. 521.
Cf. Harrington v. Lincoln, 4 Gray, 563, 565.

³ *Com. v. Ingraham*, 7 Gray, 46.

² *Com. v. Ingraham*, 7 Gray, 46;
People v. Ah Fat, 48 Cal. 61; *Tipton v. State*, 17 S. W. Rep. 1097; 30 Tex. App. 530; *Galveston, etc. Co. v.*

⁴ See §§ 165-178.

⁵ *Lord Melville's Case*, 29 How. St. Trials, 683.

⁶ 46 Geo. III., ch. 37; 2 N. Y. R. S. 405, § 71.

so that it is now the general rule that no witness is privileged from answering any relevant question solely for the reason that his answer may tend to render him liable to a civil liability or open the door for the prosecution of a civil action against him.¹

§ 354. **Questions tending to disgrace the witness.**—In regard to those questions which merely tend to *disgrace the witness* in the eyes of those who know him, an important distinction is made by the authorities founded on the nature and relevancy of the fact which is to be elicited.² Where the question is put on the direct examination, with the sole object of obtaining evidence of some fact directly relevant, it is not only unjust but absurd to close the mouth of the witness, where the life, the liberty or the most valuable rights of others may depend upon his answer, solely because that answer may disgrace him. The answer which he may give, while it may disgrace him, will not render him liable to punishment for a crime nor subject him to the danger of a civil suit. On the other hand, it may be absolutely necessary in ascertaining the guilt or innocence of a prisoner accused of some heinous crime or to determine pecuniary interests of paramount importance.³ So a witness will be compelled to give evidence, however much it may humiliate, disgrace or degrade him, to any transaction which forms a part of the matter which is in issue.⁴ But where questions tending to disgrace a witness are asked in cross-examining a witness different principles apply. To prevent the multiplication of issues it is not allowable, as we have explained, to interrogate on cross-examination upon wholly irrelevant matters merely for the purpose of subsequently contradicting the witness. Accordingly, if the dis-

¹ Williams v. Butcher, 22 Neb. 683; 37 N. W. Rep. 586; Cox v. Hill, 3 Ohio St. 411; Clark v. Zeigler, 85 Ala. 154; Jones v. Lanier, 2 Dev. (S. C.) L. 480; Durfee v. Knowles, 50 Hun, 601; 2 N. Y. S. 466; Taney v. Kemp, 4 H. & J. 348; Moline Wagon Co. v. Preston, 35 Ill. App. 358; Ward v. Sharp, 15 Vt. 115. *Contra*, Benjamin v. Hathaway, 3 Conn. 528.

² 1 Greenl. on Ev., § 454; Phil. & Am. on Ev., pp. 917, 918.

³ People v. Mather, 4 Wend. 250-254; Cundell v. Pratt, 1 M. & Malk. 108. See Phil. & Am. on Ev., pp. 917, 918; 2 Phil. Ev. 422.

⁴ Ex parte Boscowitz, 84 Ala. 463; 4 S. Rep. 279; Johnston Hard. Co. v. Muller, 72 Mich. 205. See cases in note 3.

gracing question is asked for that purpose it may be excluded because it is irrelevant. But objections based on irrelevancy are to be taken by the parties, not by the witness, and mere irrelevancy alone will not, in strictness of language, confer any personal privilege as such upon a witness.

It is not possible to lay down any general rule as to what questions are relevant on a cross-examination. While the matter is largely in the discretion of the court it is clear that this discretion should be exercised in protecting a witness from needless insult and from impertinent questions designed to surprise him and to cause him to lose his temper.¹ The present tendency is to regard all facts as relevant which will enable the jurors to decide to what extent the testimony of the witness can be relied upon, and among such facts are his present or previous moral character and his previous conduct and life, whether irreproachable or the reverse. Accordingly a witness may be asked, with a view to show his character for truthfulness, as to specific facts not too remote in time which may tend to disgrace him, and counsel will be bound by his answers.²

In the absence of a statute permitting the question, the witness cannot be asked on cross-examination if he has been convicted of or imprisoned for a crime. Here no question of privilege arises. It is for the party or the court, of its own motion, to interpose, since the conviction or imprisonment is usually of record, and a complete transcript of the record is the best and only competent evidence of the fact of conviction.³ So while the fact that a prosecuting witness in a trial

¹ *Com. v. Shaw*, 4 Cush. 593; *Com. v. Sackett*, 22 Pick. 394; *Smith v. Castles*, 1 Gray, 108. *Shore, etc. Co. (Mich., 1893)*, 54 N. W. Rep. 638; *Ex parte Boscowitz*, 84 Ala. 434; *People v. Casey*, 72 N. Y. 383; *Ryan v. People*, 79 N. Y. 594; *Carroll v. State (Tex., 1893)*, 24 S. W. Rep. 100. *Cf. contra*, *State v. Houx*, 109 Mo. 654.

² *Best, Ev.*, § 546; *Clayton v. State (Tex., 1893)*, 22 S. W. Rep. 404; *Attorney-General v. Hitchcock*, 1 Ex. 102; *Reg. v. Burke*, 8 Cox, 44; *People v. Hite (Utah, 1893)*, 33 Pac. Rep. 254; *Roberts v. Com. (Ky., 1893)*, 20 S. W. Rep. 267; *State v. Miller*, 13 S. W. Rep. 832; 100 Mo. 606; *State v. Taylor (Me., 1893)*, 22 S. W. Rep. 806; *Ford v. State (Ga., 1893)*, 17 S. E. Rep. 667; *Cole v. Lake*

³ *Chambless v. State (Tex., 1894)*, 24 S. W. Rep. 899; *Rex v. Lewis*, 4 Esp. 225; *Newcomb v. Griswold*, 24 N. Y. 298; *Spiegel v. Hays*, 118 id. 661; *State v. Minor (Mo., 1893)*, 22 S. W. Rep. 1085; *State v. Alexis (La., 1893)*, 13 S. Rep. 394; *Daggett*

for rape or seduction had committed adultery with other men is not directly relevant upon the guilt or innocence of the prisoner, questions respecting such intimacy may be asked her if intended solely to impeach her testimony that she was previously chaste.¹

Every man's family relations, his domicile, his business and his social connections, his avocation and his manner of living, are, to a certain extent, within his own power of selection. If then he voluntarily associates with persons who are disreputable, or engages in practices or in occupations which are disgraceful or vicious, though not perhaps criminal, he may, so far as these facts bear upon his truthfulness, be compelled to answer all interrogatories.² So a witness may be asked on

v. Sims, 79 Ga. 253; State v. Farmer, 84 Me. 436. Cf. *contra*, State v. Taylor (Mo., 1893), 24 S. W. Rep. 449; People v. Crowley (Cal., 1893), 35 Pac. Rep. 84. It is very improper for counsel to accuse the witness of perjury by implication by asking him if he knows the penalty for that crime. People v. O'Brien (Mich., 1893), 56 N. W. Rep. 72. Sometimes it is provided by statute that a witness may be asked on his cross-examination if he was ever convicted of a crime. Spiegel v. Hays, 118 N. Y. 660; People v. Rodrigo, 69 Cal. 601; State v. Adamson, 43 Minn. 196; State v. McGuire, 15 R. I. 23; State v. Miller, 100 Mo. 106; Handlin's Estate v. Law, 34 Ill. App. 84; Helm v. State, 67 Miss. 562; Com. v. Morgan, 107 Mass. 205; State v. O'Brien (Iowa, 1891), 46 N. W. Rep. 861; State v. Merriman (S. C., 1891), 12 S. E. Rep. 619; State v. Pfefferle, 36 Kan. 90. If he denies that he was ever convicted of a crime, he may be contradicted by the record of his conviction. State v. McGuire, 15 R. I. 23; People v. Carolan, 71 Cal. 195; State v. Wise, 33 S. C. 582; Helwig v. Laschcowitz, 82 Mich. 619; Sisson v. Yost, 58

Hun, 609; State v. Sauer, 42 Minn. 258. See, also, cases *supra*. These statutes are strictly construed. Thus, a question, "Were you ever convicted of *crime*?" is improper under a statute allowing the witness to be interrogated as to his previous "*conviction of felony*." Hanners v. McClelland, 74 Iowa, 318. Where a statute permits a "conviction of any crime" to be shown, any crime, whether a felony or misdemeanor, may be shown. Helm v. State, 67 Miss. 562; State v. Sauer, 42 Minn. 258. See cases cited under §§ 318, 319. To rebut the presumption raised by proof of the conviction of the witness, he may on his redirect examination, testify to his innocence of crime. Walkoff v. Tefft, 12 N. Y. S. 464. And where it appears that he was pardoned, the reasons for granting the pardon and the celerity with which it was granted may also be shown. Sisson v. Yost, 58 Hun, 609; 12 N. Y. S. 373.

¹ Taylor, Ev., § 1293, n.; People v. Harrison, 93 Mich. 594; Com. v. Regan, 105 Mass. 593. *Contra*, State v. Patterson, 74 N. C. 157.

² Grimes v. Connell, 23 Neb. 187; People v. Tiley, 84 Cal. 651.

cross-examination if she keeps a house of ill-fame;¹ if she is a prostitute² or an habitual user of opium;³ whether he is a volunteer witness;⁴ if he has attempted to bribe another witness,⁵ or whether he had not fled to escape criminal prosecution.⁶ But a witness who is also a party defendant cannot be asked on his cross-examination if he has disposed of his property with the view of escaping an adverse judgment in that case.⁷ Nor can a witness be asked if he was impeached as a witness in another cause.⁸

The asking of incriminating or disgracing questions is a matter largely in the discretion of the court,⁹ and where no material injury is thereby done to either party, the refusal of the court to order such a question stricken out will not be reversible error. If, however, counsel persists in asking a material witness, whose credit is otherwise unimpeached, insulting and disgracing irrelevant questions not tending to show that the witness was to be disbelieved, and follows this up by attempting to contradict him by offering and reading from inadmissible writings, stating to the jury that the witness had contradicted himself, a conviction of murder will be set aside because of the unfair and prejudicial effect of such a course of action on the minds of the jurors.¹⁰

§ 354a. Questions tending to expose witness to a criminal charge.—A witness cannot be compelled to answer any question where it is reasonable to suppose that his answer will tend to incriminate him or render him subject to punishment for crime.¹¹ It is immaterial whether the question has been

¹ *State v. Hack* (Mo., 1893), 23 S. W. Rep. 1089.

² *State v. Coella*, 5 Wash. 99.

³ *People v. Webster*, 68 Hun, 11.

⁴ *Wabash, etc. Co. v. Ferris* (Ind., 1893), 32 N. E. Rep. 112.

⁵ *State v. Hack*, *supra*. Cf. *Com. v. Mason*, 105 Mass. 163.

⁶ *State v. Duncan* (Wash., 1893), 35 Pac. Rep. 117; *Copp v. Hollins*, 9 N. Y. S. 57.

⁷ *French v. Wilkinson*, 93 Mich. 322; 53 N. W. Rep. 530.

⁸ *Cockrill v. Hall*, 76 Cal. 192; 18 Pac. Rep. 318.

⁹ *Com. v. McDonald*, 110 Mass. 545.

¹⁰ *People v. Carr*, 64 Mich. 702; 31 N. W. Rep. 509. Cf. *Com. v. Shaw*, 4 Cush. 593.

¹¹ *Worthington v. Scribner*, 109 Mass. 487; *Stevens v. State*, 32 Pac. Rep. 350; 50 Kan. 712; *Friess v. N. Y. Cent. & H. R. R.*, 22 N. Y. S. 104; 67 Hun, 205; *Taylor v. McIrvin*, 94 Ill. 488; *Minter v. People*, 139 Ill. 363; *State v. Hardware Co.*, 109 Mo. 118; *Yard's Appeal*, 148 Pa. St. 509; *Ex parte Boscowitz*, 84 Ala. 483; *State v. Coella*, 3 Wash. St. 99; *Com. v. Trider*, 143 Mass. 180; *Minter v. Peo-*

partially answered before he objects or is wholly unanswered;¹ for if the answer "forms but one link in the chain of testimony which would convict him," he need not answer at all.² If the witness will swear that he believes that to answer would incriminate him, he need not show in detail how that result would be produced, for to compel him to do this would be to destroy the protection which he enjoys.³ If he choose to answer he may do so, but the court must inform him that he need not;⁴ and it is for the judge to determine as a matter of law whether any possible answer that the witness may give will tend to incriminate him directly, or indirectly by furnishing a missing link in the chain of proof.⁵ If from all

ple, 29 N. E. Rep. 45; 39 Ill. App. 438; *Temple v. Com.*, 75 Va. 892; *Southard v. Rexford*, 6 Cowen, 254. In an early case it was held that an incriminating reply wrongfully extorted from the witness could not subsequently be used against him. *Reg. v. Garbott*, 1 Denio, C. C. 236; *Emery Cases*, 107 Mass. 180. A defendant in chancery will not be compelled to answer interrogatories contained in a bill of discovery which will tend to incriminate him or subject him to punishment. *McIntire v. Mancius*, 16 Johns. 592; *Wigram on Discovery*, pp. 61, 150, 195; *Story's Eq. Pleading*, §§ 524, 576, 577, 592-598. So also, both in equity and at law, a witness will not be compelled to answer questions where his answer may subject him to a forfeiture of his estate. 1 *Greenl. Ev.*, § 453; *Story's Eq. Plead.*, §§ 607, 846; *Respublica v. Cribbs*, 3 Yeates, 429.

¹ The matter is largely in the discretion of the court. *Mayo v. Mayo*, 119 Mass. 290; 1 *Whart. Ev.*, §§ 553-540. Only the incriminating portion of the testimony should be stricken out where the witness has answered. *State v. Tall*, 43 Minn. 273.

² 1 *Greenl. Ev.*, § 451. In 1 *Burr's Trial*, 244, the court by Marshall, C. J., said: "Many links frequently

compose that chain of testimony necessary to convict an individual of a crime. It appears to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness by disclosing a single fact may complete the testimony against himself and to every effectual purpose accuse himself entirely, as he would by stating every circumstance which would be required for his conviction."

³ *People v. Mather*, 4 Wend. 229, 252, 253, 254; *In re Bellinger*, 8 Wend. 595; *Friess v. N. Y. Cent. & H. R. R. Co.*, 67 Hun. 205. The actual innocence of the witness is immaterial if his answer would tend to convict him of a crime. *Adams v. Lloyd*, 4 Jur. (N. S.) 590. If, having been instructed as to his rights, the witness answers an incriminating question, he may be compelled to go into every detail of the inculpatory circumstances. *Foster v. Pierce*, 11 Cush. 437, 439; *Com. v. Pratt*, 126 Mass. 462; *State v. Van Winkle*, 80 Iowa, 15; *Williams v. State* (Ala., 1893), 13 S. Rep. 333.

⁴ *Close v. Olney*, 1 Denio, 319.

⁵ See *People v. Mather*, 4 Wend. 252-254; *State v. Thaden*, 43 Minn.

the circumstances and from the character of the answer which is required it seems clear that there is no reasonable ground for the supposition that the answer will tend to incriminate him, the witness should be compelled to answer, though he shall swear that he believes his answer will incriminate him.¹ If the danger to the witness is apparent he may be allowed to use a large discretion in refusing to answer.²

A defendant in a criminal trial who testifies voluntarily in his own behalf cannot refuse to answer incriminating questions on his cross-examination, for by denying his guilt on the stand he will (except in those states where the cross-examination is limited by statute to the matters gone into on the direct examination)³ by implication be deemed to have waived his privilege as a witness so far as questions relevant to his guilt or to his credibility are concerned.⁴

The privilege of refusing to answer incriminating questions is personal to the witness. Neither party can object to the witness answering them if he desires to do so.⁵ The jury

253; *State v. Tall*, 43 id. 273; *Com. v. Bell*, 145 Pa. St. 374. A person who waives his privilege and testifies before the grand jury cannot, when he is indicted with others for the crime, refuse to testify on the trial of a co-defendant because his answer may criminate him. *State v. Van Winkle*, 45 N. W. Rep. 388.

¹ *Forbes v. Willard*, 37 How. Pr. 193; *Lathrop v. Roberts*, 16 Colo. 250.

² *Williams v. Dickinson*, 28 Fla. 90; *Chamberlain v. Wilson*, 12 Vt. 491; *Minter v. People*, 29 N. E. Rep. 45; 39 Ill. App. 438.

³ *State v. Chamberlain*, 89 Mo. 129.

⁴ *McClain v. People*, 1 Atl. Rep. 45; 110 Pa. St. 263; *Sullivan v. People*, 114 Ill. 24; *State v. Sanders*, 106 Mo. 188; *State v. Uhrig*, 106 Mo. 267; *Com. v. Mullern*, 97 Mass. 545; *Rains v. State*, 88 Ala. 91; *Andrews v. Frye*, 104 Mass. 234; *State v. Ober*, 52 N. H. 459; *Connors v. People*, 50 N. Y. 240; *State v. Allen*, 107 N. C. 105; *Spies v. People*, 122 Ill. 235;

State v. Withan, 72 Me. 531; *People v. Tice*, 131 N. Y. 651; *Com. v. Damon*, 136 Mass. 441; *People v. Oyer & Terminer*, 83 N. Y. 436; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 id. 285; *State v. Wentworth*, 65 Me. 234; *Stover v. People*, 56 N. Y. 315; *Roddy v. Finnegan*, 43 Md. 490.

⁵ *Williams v. Dickinson*, 28 Fla. 90; *State v. Wentworth*, 65 Me. 234; *Thomas v. Newton*, 1 M. & M. 48; *Taylor v. State* (Ga., 1890), 10 S. E. Rep. 442; *People v. Teague*, 82 Mich. 22; *Com. v. Gould* (Mass., 1893), 33 N. E. Rep. 656; *Brown v. State* (Tex., 1893), 20 S. W. Rep. 924; *Clifton v. Granger* (Iowa, 1893), 53 N. W. Rep. 316; *People v. Teague*, 11 S. E. Rep. 665; 106 N. C. 576; *Com. v. Shaw*, 4 Cush. (Mass.) 594; *Lathrop v. Roberts*, 16 Colo. 250. Where the accused has voluntarily testified to his age, he may properly be required to stand up so that the jury may observe his personal appearance. Will-

should be advised that no inference that the witness is a criminal should be drawn from his refusal to answer,¹ and in any case if, after he has claimed his privilege, he is forced to answer, the information given cannot afterwards be used against him,² or by either party in the pending action.³ Where the witness, because he has been acquitted,⁴ or by lapse of time, is no longer liable to a prosecution, he is not privileged, and may be compelled to answer.⁵

§ 354b. Bias and prejudice of the witness.—These words, though commonly employed together, are not synonymous. Prejudice, in strictness of language, means a prejudgment; any judgment or opinion formed beforehand, and does not, in its legal acceptance, necessarily imply any ill-will or enmity towards a person.⁶ But a person whose mind is biased, whether he be a witness or a juror, is one who entertains such a degree of personal dislike towards one party, or such an inclination, affection or prepossession towards the other, that he is utterly incapable of acting or speaking indifferently and impartially as to a transaction in which either is concerned.⁷ A man who is prejudiced, who has made up his

iams v. State (Ala., 1893), 13 S. Rep. 333.

¹*State v. Bartlett*, 55 Me. 200; *Devries v. Phillips*, 63 N. C. 53. It is submitted that any rule, whether statutory or formulated by judicial legislation, which forbids a juror from drawing the perfectly logical and fair conclusion that a witness is a criminal because he claims the privilege of refusing to answer incriminating questions, would be nugatory.

²So by statute. See *Ex parte Buskett*, 106 Mo. 602; 17 S. W. Rep. 753; *United States v. Smith*, 47 Fed. Rep. 501.

³*Reg v. Kinglake*, 22 L. T. (N. S.) 335. A witness who is under indictment for a crime which is the subject of a legislative investigation cannot for that reason refuse to attend or to be sworn as a witness. He must wait until he is questioned

before he can claim to be privileged from answering the incriminating questions. In *re Eckstein*, 24 Atl. Rep. 63; 3 W. N. C. 59; 10 Pa. Co. Ct. R. 41.

⁴*Lathrop v. Roberts*, 16 Colo. 250.

⁵*Ex parte Boscowitz*, 84 Ala. 434; *People v. Kelly*, 24 N. Y. 74; *So. Rail. N. Co. v. Russell* (Ga., 1893), 18 S. E. Rep. 40. *Contra*, *McFadden v. Reynolds* (Pa., 1888), 11 Atl. Rep. 638. He may also be compelled to answer incriminating questions where it is expressly provided by statute that such testimony shall in no case be used against him. *Ex parte Buskett*, 17 S. W. Rep. 753; 106 Mo. 602.

⁶*Anderson's Law Dict.*, "Prejudice;" *Willis v. State*, 12 Ga. 448; *Com. v. Webster*, 5 Cush. 297.

⁷In *Everman v. Hyman* (Ind., 1892), 28 N. E. Rep. 1022, bias is defined as "A leaning of the mind,

mind and formed an opinion as to the justice of the cause, is necessarily biased towards that party whose case he believes is just. But a witness may be biased by his interest or by the ties of friendship or affection without being prejudiced, *i. e.*, without having any definite opinion as to the merits of the case.

The bias of a witness so far as it affects the credibility of his testimony is not collateral and may always be shown either by his own statements on his examination or by the independent evidence of others. Thus, as has been already pointed out, a party may show that his own witness has unexpectedly proved hostile to him and may emphasize such hostility or bias by showing by another witness that the biased witness was formerly favorably inclined towards him.¹ The bias of the witness may also be shown on his cross-examination by interrogating him as to his sympathy or hostility towards either of the parties or as to his interest in the subject-matter.² Though the possession of an actual pecuniary interest is generally no longer an objection to the competency of a witness, it may still be shown as a fact from which the jury may infer that the witness was biased. And the same principle is recognized in the case of an existing relationship between the witness and a party to the action. So the jury may with propriety employ great caution in weighing the testimony of witnesses who are near relatives of the accused in a criminal trial when they testify in his behalf,³ unless the inference of bias is rebutted by the party who calls the wit-

propensity towards the object, not leaving the mind indifferent; inclination, prepossession, bent."

¹ See *ante*, § 348.

² See *ante*, § 340. In proving bias for the purpose not of direct contradiction but of discrediting the witness, it is the general rule that a foundation must be laid and the attention of the witness called to the time and place of the declarations showing bias. *Queen's Case*, 2 B. & B. 284, 311; *Edwards v. Sullivan*, 8 Ired. (N. C.) 302; *Crumpton v. State*, 52 Ark. 273; *Baker v. Joseph*, 16

Cal. 173; *Bates v. Holladay*, 31 Mo. App. 162 (bribery of witness). If on being questioned witness denies that he is biased, the fact may then be shown by other witnesses. *State v. McFarlain*, 41 La. Ann. 686; *Hamilton v. Man. Ry. Co.*, 9 N. Y. S. 313; *Bennett v. State*, 28 Tex. App. 329.

³ *United States v. Ford*, 23 Fed. Rep. 861; *State v. Byers*, 100 N. C. 512; 6 S. C. R. 420; *Simpson v. State*, 78 Ga. 91; *Staser v. Hogan*, 120 Ind. 207.

ness proving that the witness and he have been on bad terms.¹ The bias of the witness may have arisen because of promises or threats made or bribes offered by one of the litigants. Though the witness was thus tampered with his testimony is still admissible, and while evidence of the attempt to bribe is admissible it is for the jury to determine if either party was implicated and what effect, if any, the threats or bribery may have had upon the credibility of the testimony of the witness.²

¹ *Clapp v. Wilson*, 5 Denio (N. Y.), 285.

² *Hitchcock v. Moore*, 70 Mich. 112; 37 N. W. Rep. 914.

CHAPTER XXV.

AFFIDAVITS AND DEPOSITIONS.

§ 355. Affidavits and depositions defined and distinguished.	§ 360. Mode of procuring depositions.
356. Parties to affidavits.	361. Statutes construed —The certificate.
357. Formal requisites of affidavits.	362. Objections to depositions.
358. Language of the affidavit.	363. Use of depositions as evidence.
359. Definition and character of depositions.	364. Equitable bills to perpetuate testimony.

§ 355. Affidavits and depositions defined and distinguished.—Written evidence which is verified by an oath is sometimes loosely classified under the general term “deposition.” In view of the different uses to which affidavits and depositions may be put, it is important to distinguish clearly between them. A deposition usually consists of answers to questions oral or written, and the opposite party is entitled to notice and must be given an opportunity to cross-examine the deponent.¹ An affidavit, on the other hand, is commonly voluntary,² *ex parte*, and may be and usually is taken without notice to the adverse party.³ So the uses to which an affidavit may be put are very different from a deposition. Thus, an affidavit is of utility in matters which are collateral or initiatory to the subject of the trial, but which prepare for it or facilitate its progress; as, for example, where some extraordinary remedy, as an attachment⁴ or an injunction, is sought, or where a commission is required for the purpose of procuring the testimony of an absent witness,⁵ or where it is desired

¹ See *post*, § 359 et seq.

² *Dudley v. McCord*, 65 Iowa, 671.

³ “An affidavit is simply a declaration, on oath, in writing, sworn to by the declarant before a person who has authority to administer oaths.” *Harris v. Lester*, 80 Ill. 311; *Woods v. State* (Ind., 1893), 33 N. E.

Rep. 903; *State v. Hennings* (S. D., 1893), 54 N. W. Rep. 537; *Stimpson v. Brooks*, 3 Blatch. 436; *Atchison v. Bartholow*, 4 Kan. 124; *State v. Dayton*, 25 N. J. L. 54.

⁴ *Wirt v. Dinan*, 44 N. Y. App. 583.

⁵ “Questions which do not involve the matter in controversy, but mat-

to open a default to obtain a continuance¹ or a new trial,² or on a motion for judgment on a nonsuit.³ They are no part of the record unless they are made so, and serve mainly to verify facts which are not themselves matter of record. Except so far as they may constitute admissions of the affiant, affidavits are not evidence of the material facts in issue.⁴

§ 356. **Parties to affidavits.**—An affidavit should be made by a party to the action, and it is immaterial whether he is a party to the record if he is a party in interest;⁵ though, if it be shown that the party is disabled by illness, or that he is out of the jurisdiction, an affidavit by his counsel may be admissible.⁶ But the reason that the affidavit is not made by the party,⁷ and the authority of the attorney to act for him, must appear on the face of the affidavit.⁸ In the absence of

ter which is auxiliary to the trial, which facilitates the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance or a commission to take his deposition, or an affidavit of his inability to attend, is usually made by the party and received without objection. So affidavits in support of a new trial are often received." *Taylor v. Biggs*, 1 Pet. (U. S.) 591.

¹ *Freeport v. Penrod*, 53 N. W. Rep. 74; 35 Neb. 273; *Dawson v. Coston* (Colo., 1893), 33 Pac. Rep. 189; *Keith v. Knoche*, 43 Ill. App. 161.

² *Atkinson v. Saltman* (Ind., 1893), 29 N. E. Rep. 435.

³ *Ames v. Merriam*, 9 Wend. (N. Y.) 498. Supplemental affidavits are those which contain averments upon the same subject as another prior affidavit and which are designed to remedy some defect in it. *Callan v. Lukens*, 89 Pa. St. 136; *Fritz v. Hathaway*, 19 Atl. Rep. 1011; 26 W. N. C. 273.

⁴ *Lewis v. Bacon*, 3 Hen. & M. (Va.) 89; *Armstrong v. Boylan*, 4 N. J. L. 84; *Patterson v. Insurance Co.*,

3 Har. & J. (Md.) 71; *Nat. S. S. Co. v. Tugman*, 143 U. S. 28; *Asbach v. Chicago, etc. Co.* (Iowa, 1893), 53 N. W. Rep. 90; *Ohio, etc. Co. v. Levy* (Ind., 1893), 32 N. E. Rep. 815.

⁴ *Feeley v. Steinmetz*, 22 Pa. St. 437; *Hunter v. Riley*, 36 Pa. St. 509; *Miller v. Hooker*, 2 How. Pr. (N. Y.) 124.

⁶ *Spencer v. Bell*, 109 N. C. 39; *Gazam v. Royce*, 78 Ga. 512. Conviction of an infamous crime renders a person incompetent to make an affidavit at common law. *People v. Robinson*, 26 How. Pr. 90; *Webster v. Mann*, 56 Tex. 119. See *ante*, § 319. Where an affidavit is made by a person who is incarcerated in an insane asylum, the jurat must show the place where it was made and all the surrounding circumstances in order that the mental condition of the affiant may be inquired into. *Spittle v. Walton*, L. R. 11 Eq. 420.

⁷ *Pack v. Geofroy*, 19 N. Y. S. 583; *Blake Crusher Co. v. Ward*, 1 Am. L. T. R. 423; *Jackson v. Woodworth*, 3 Paige (N. Y.), 136; *City v. Devine*, 1 W. N. C. (Pa.) 358.

⁸ *Adams v. Kellogg*, 63 Mich. 105;

statute an affidavit may be sworn to before any official authorized to administer oaths.¹ When, however, a statute authorizes certain officials to administer oaths, an affidavit not sworn to before that official is invalid and may be disregarded.²

As a general rule affidavits which are sworn to before the attorney of the party are not competent though the attorney may be otherwise authorized as a notary to take affidavits.³ But this rule is not without exceptions;⁴ and generally an affidavit may be taken by the partner of the attorney if the latter is not also the attorney of the party.⁵

§ 357. **Formal requisites of affidavits.**—The affidavits should be accurately entitled,⁶ though as a general rule, when the affidavit can be otherwise identified, a mistake in this respect or the absence of a caption or a title will be disregarded.⁷ If the venue is stated in the affidavit⁸ it is immaterial that it does not appear appended to the signature of the notary;⁹ for

Weatherwax v. Paine, 2 Mich. 555; *Rutledge v. Stribling*, 26 Ill. App. 453; *Willis v. Lyman*, 22 Tex. 268; *Wallace v. Byrne*, 17 La. Ann. 8. *Contra*, *Simpson v. McCarthy*, 78 Cal. 175. The affidavit of a corporation should be made by its chief official having a competent knowledge of the facts. *Ex parte Sergeant*, 17 Vt. 425.

¹ *Cassidy v. Meyers*, 64 Miss. 510; *Young v. Rollins*, 78 N. C. 485.

² *Haight v. Proprietors*, 4 Wash. C. C. 601, 606; *Irving v. Edrington*, 41 La. Ann. 671; *United States v. Bailey*, 9 Pet. (U. S.) 238; *Stanton v. Ellis*, 16 Barb. (N. Y.) 319; *Benedict v. Hall*, 76 N. C. 113; *Love v. McAlister*, 42 Ark. 183; *Roberts v. Railroad Co.*, 1 Brew. (Pa.) 538.

³ *Pullen v. Pullen* (N. J., 1839), 17 Atl. Rep. 310; *Taylor v. Hatch*, 12 Johns. 340; *Toorle v. Smith*, 34 Kan. 27; *Swearingen v. Hawser*, 37 Kan. 126; *Vary v. Godfrey*, 6 Cow. 587; *Willard v. Judd*, 15 Johns. 531; *Hammond v. Freeman*, 9 Ark. 62.

Cf. Linck v. Litchfield (Ill., 1893), 31 N. E. Rep. 123.

⁴ *Reavis v. Cowell*, 56 Cal. 588; *Young v. Young*, 18 Minn. 90; *Ryburn v. Moore*, 72 Tex. 85; *Daws v. Glasgow*, 1 Pin. (Wis.) 171.

⁵ *Northumberland v. Todd*, L. R. 7 Ch. Div. 777.

⁶ *Baxter v. Seaman*, 1 How. (N. Y.) 51; *Humphrey v. Caude*, 2 Cow. (N. Y.) 509.

⁷ *Harris v. Lester*, 80 Ill. 207; *Beebe v. Morrell*, 76 Mich. 114; *Maury v. Van Arnum*, 1 Hill (N. Y.), 370; *Hawley v. Donnelly*, 8 Paige (N. Y.), 415; *Minzenheimer v. Heinze*, 74 Tex. 254.

⁸ *Thompson v. Burhans*, 61 N. Y. 52; *Cook v. Staats*, 18 Barb. (N. Y.) 407.

⁹ *Smith v. Runnells*, 94 Mich. 617; *State v. Can. Pac. Ry. Co.*, 17 Nev. 239. But the venue must appear somewhere on the face of the affidavit. *People v. Canvassers*, 20 N. Y. S. 329.

though without a venue stated the affidavit is void as such,¹ yet in a prosecution for perjury, committed in swearing to the affidavit, the absence of the venue is immaterial, as time and place may be shown orally.² A signature is indispensable to the validity of the affidavit only when it is required by statute or by a rule of court;³ but an unsigned affidavit will sustain a prosecution for perjury, the gist of the crime being the false swearing.⁴ The jurat must state that it was sworn to or affirmed before the proper official,⁵ and it must generally be subscribed by him,⁶ and should be authenticated by his official seal,⁷ unless it is to be used in the county in which he resides.⁸

But generally the courts are disposed to exercise a wise discretion in allowing amendments of technical defects,⁹ and sometimes of those which are material as well.¹⁰

¹ Cook v. Staats, 18 Barb. (N. Y.) 407; Lane v. Morse, 6 How. (N. Y.) 394.

² Reavis v. Cowell, 56 Cal. 558; Young v. Young, 18 Minn. 90; Parker v. Baker, 8 Paige (N. Y.), 428.

³ Haff v. Spicer, 3 Paige (N. Y.), 190; Norton v. Hauge, 47 Minn. 405; Shelton v. Berry, 19 Tex. 154; Alford v. McCormac, 90 N. C. 151; Gill v. Ward, 23 Ark. 16; Bates v. Robinson, 8 Iowa, 318; Hargadine v. Van Horn, 72 Mo. 370; Nave v. Ritter, 41 Ind. 301.

⁴ See cases in last note.

⁵ State v. Green, 15 N. J. L. 88; Palmer v. McCarthy (Colo., 1893), 31 Pac. Rep. 241; Ladow v. Groom, 1 Denio (N. Y.), 429; Morris v. State, 2 Tex. App. 502.

⁶ Cantwell v. State, 27 Ind. 505; McDermaid v. Russell, 41 Ill. 490; State v. Richardson, 34 Minn. 118; Davis v. Rich, 2 How. (N. Y.) 86; State v. Green, 15 N. J. Law, 88. That the official omits to state his official title is immaterial. People v. Van Rensselaer, 6 Wend. (N. Y.) 543; Hunter v. Leconte, 6 Cow. (N. Y.) 728.

⁷ Chase v. Street, 10 Iowa, 593.

⁸ Stout v. Slattery, 12 Ill. 162; Clemens v. Bullen (Mass., 1893), 34 N. E. Rep. 173; Mountjoy v. State, 78 Ind. 172. Cf. Coward v. Dillinger, 56 Md. 59. "If an oath was administered by a proper officer the law was satisfied, and the mere omission of a clerk to put his name to an act which was done through him as an instrument should not prejudice an innocent party." The court, in Kruse v. Wilson, 79 Ill. 233.

⁹ Rosenberg v. Clafin (Ala., 1893), 10 S. Rep. 521; Stacy v. Farnham, 2 How. (N. Y.) 26; Watts v. Womack, 44 Ala. 605.

¹⁰ Cutler v. Rathbone, 1 Hill, 205 (affidavit of hearsay); Hardin v. Lee, 51 Mo. 241; Kruse v. Wilson, 79 Ill. 233; Jones v. Slate Co., 16 How. (N. Y.) 129; Salmon v. Mills, 4 U. S. App. 101; 1 C. C. A. 278. Cf. Freer v. White (Mich., 1893), 51 N. W. Rep. 807; Brookmire v. Rosa (Neb., 1890), 51 N. W. Rep. 840; Sheldon v. Kivett, 110 N. C. 408. That an affidavit may be filed or a jurat added *nunc pro tunc*, see Will-

§ 358. **Language of the affidavit.**—The terms in which the affidavit is expressed must be certain, positive and unambiguous.¹ The affiant must swear to a definite thing, though an affidavit will not be construed in a technical spirit if in the main it substantiates the party's case.² Still it may be said that where an affidavit is required to be made by statute the requirements of the statute must be complied with, and in such a case a strict adherence to the language of the statute is the only safe course for the party to pursue in order to render the affidavit valid.³ Scandalous matter may vitiate an affidavit,⁴ but the fact that an affidavit is a translation,⁵ or that it was sworn to in a foreign language which was not understood by the affiant, will not render it invalid, provided it was properly translated to him.⁶ Where a statute permits the affiant to amend his affidavit he may amend at any time. He need not wait until it is pronounced defective.⁷

iams v. Stevenson, 103 Ind. 243. "Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted. The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them." *Stephen's Dig.*, art. 125.

¹ *Boulter v. Behrend*, 20 D. C. 567; *Cosmer's Adm'r v. Smith*, 15 S. E. Rep. 977; 36 W. Va. 788; *Johnson v. Buckel*, 20 N. Y. S. 566; 65 Hun, 601; *Hitnier v. Boutclies*, 67 Hun, 203; *Irvin v. Howard*, 37 Ga. 23; *Dunnenbaum v. Schram*, 59 Tex. 281; *Winters v. Pearson*, 72 Cal. 553; *Parsons v. Stockbridge*, 42 Ind. 121; *Burnett v. McCluey* (Mo., 1888), 4 S. W. Rep. 694; *Carleton v. Carleton*, 85 N. Y. 313; *Thompson v. Judge*, 54 Mich. 237.

² *Altmeyer v. Caulfield*, 37 W. Va. 847; *Haight v. Arnold*, 48 Mich. 512; *Filer, etc. Co. v. Sohns*, 63 Wis. 118; *Wirt v. Dinan*, 44 Mo. App. 583; *Baumgartner v. Mfg. Co.* (Minn., 1893), 52 N. W. Rep. 964; *Hinzie v. Moody*, 1 Tex. Civ. App. 26; *Hall v. Kintz*, 13 Pa. Co. Ct. Rep. 24; *Bigelow v. Chatterton*, 10 U. S. App. 267.

³ *Carleton v. Carleton*, 85 N. Y. 313; *Pearce v. Hawkins*, 62 Tex. 435; *Ilett v. Collins*, 102 Ill. 402; *Mathews v. Sharp*, 99 Pa. St. 560; *Miller v. Munson*, 34 Wis. 579; *Blum v. Davis*, 56 Tex. 426.

⁴ *Balls v. Smith*, 2 M. & G. 350; *Opdyke v. Marble*, 18 Abb. Pr. 375.

⁵ *In re Eady*, 6 Dowl. Pr. Cas. 615.

⁶ *Bose v. Solliers*, 6 Dowl. & Ry. 514; *Marzetti v. Du Jouffray*, 1 Dowl. Pr. Cas. 41.

⁷ *Musgrove v. Mott*, 90 Mo. 107; 2 S. W. Rep. 214; *Fortenheim v. Claflin*, 47 Ark. 49.

§ 359. Definition and character of depositions.—"A deposition is evidence given under interrogatories, oral or written, and usually written down by an official person."¹ Depositions may be offered as evidence in all cases where a non-resident witness refuses or is unable to attend court, or where a witness who is resident within the jurisdiction is so ill or feeble that he cannot appear in court.² The usefulness of this mode of procuring evidence was first recognized in courts of admiralty, where it is of particular value because of the difficulty of obtaining the presence of mariners, who are usually transient in their habits of living and places of abode.

The practice of taking depositions has been universally adopted in other tribunals of justice, and it is now almost wholly regulated by statutes, which should be consulted in every case. Under these statutes, and as a matter of practice, in their absence the party who wishes to secure the testimony of an absent witness applies to the court to issue a letter rogatory, which is in form a writ issued³ under the seal of the court directed to a court of superior jurisdiction located in the state or country in which the foreign witness resides, and requesting the latter court in furtherance of justice, and out of international comity, to cause the evidence of the witness named therein to be procured according to its customary mode of procedure, to have the same committed to writing and returned to the court issuing the letter.

Interrogatories framed by the parties are forwarded with the letter, and these, with the original answers thereto, signed by and verified with the oath of the witness and duly authenticated, are returned to the court in which the deposition is to be used.⁴ Under certain circumstances the witness

¹ *Stimpson v. Brooks*, 3 Blatch. (U. S.) 456.

² *People v. Lundquist*, 84 Cal. 23; *People v. Thompson*, 84 id. 598. Where a physician testifies that though an infirm and sick witness was able to attend court, yet she should not be compelled to do so, her deposition will be taken. *Norris v. Norris*, 3 Ind. App. 500. See, also, *ante*, §§ 282, 283, 288. As to the

subsequent introduction of the evidence of witnesses who are disqualified, see *ante*, §§ 120-124.

³ *Blakelee v. Dye* (Colo., 1893), 27 Pac. Rep. 881.

⁴ *Hemenway v. Knudsen*, 67 Hun, 648; *Fry v. Man. Trust Co.*, 23 Civ. Pro. R. 520; *Hobart v. Jones*, 5 Wash. St. 385; *Stierle v. Kaiser* (La., 1893), 12 S. Rep. 839. The interrogatories should not be leading

may be examined *viva voce* without written interrogatories or the two methods of examination may be combined.¹

§ 360. Mode of procuring depositions.—The details of the law governing the taking of depositions are largely regulated by statutes which, while differing in minor points, are upon the whole substantially alike. By the federal statute the commission may issue to a judge of a federal court, or of a superior state court, or county court, court of common pleas, or to a mayor or chief magistrate of a city.² The adverse party is entitled to reasonable notice personally served on him or his attorney, and has the absolute right to be present and to cross-examine the witness;³ and a failure to notify him,⁴ or a notice received when he is elsewhere taking another deposition in the case,⁵ will render the deposition inadmissible.⁶ The witness should be duly sworn in the precise mode which is prescribed by the statute, if any,⁷ and the examining magistrate's failure to state the fact that he was so sworn will render the deposition inadmissible.⁸

The deposition when completed with a proper certificate of

(*Lott v. King*, 79 Tex. 292), nor immaterial (*In re Allis*, 44 Fed. Rep. 216), nor call upon the witness to speak from hearsay. *Gilpin v. Daly*, 58 Hun, 610.

¹ *Laidley v. Rogers*, 67 Hun, 653; 23 Civ. Pro. R. 110; 1 Greenl. on Ev., § 320; *Pole v. Rogers*, 3 Bing. N. C. 780. Cf. *Nevitt v. Crow* (Cal., 1892), 29 Pac. Rep. 749. See as to "open commissions" in New York, Code C. P., §§ 893, 894, 897 et seq.; *Jones v. Hoyt*, 10 Abb. N. C. 324; 63 How. Pr. 94; *Heney v. Weed*, 4 Law Bul. (N. Y.) 10; *Jennison v. Citizens' Sav. Bank*, 85 N. Y. 546; *Whitney v. Wyncoop*, 4 Abb. Pr. (N. Y.) 370; *Dwinnelle v. Howland*, 1 Abb. Pr. (N. Y.) 87 (return of commission).

² U. S. R. S., §§ 863-875; *Bibb v. Allen*, 149 U. S. 481.

³ *Cole v. Hall*, 131 Mass. 88; *Vawter v. Hulse*, 112 Mo. 633; *Carrington v. Stimpson*, 1 Curt. C. C. 437.

⁴ *Sinsheimer v. Skinner*, 43 Ill. App. 608; *Goodhue v. Bartlett*, 5 McLean, 186. The reasonableness of the notice will depend upon the circumstances of each case, among which are the distance of the foreign witness from the court and the facility with which he may be found. *Sing Cheong Co. v. Yung Wing*, 59 Conn. 535; *Harris' Appeal* (Conn., 1891), 20 Atl. Rep. 617.

⁵ *Uhle v. Burnham*, 44 Fed. Rep. 792; *Latham v. Latham*, 30 Gratt. 307; *Collins v. Richart*, 14 Bush (Ky.), 621.

⁶ See, also, *Atchison, etc. Co. v. Sage*, 49 Kan. 524; *Crabb v. Orth* (Ind., 1893), 32 N. E. Rep. 711.

⁷ *Bacon v. Bacon*, 33 Wis. 147.

⁸ *Parsons v. Huff*, 38 Me. 147; *West. U. Tel. Co. v. Collins*, 45 Kan. 88; *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121; *Horne v. Haverhill*, 113 Mass. 344; *Bush v. Barron*, 78 Tex. 5 (signature).

its regularity attached should then be securely sealed by the commissioner and transmitted by mail,¹ or by some other convenient and safe method,² properly superscribed so as to show the nature of its contents, to the clerk of the court where it is to be used.³ If the purpose of the deposition is solely to procure evidence to rebut evidence which the party expects his adversary will offer, a notice to that effect must accompany the interrogatories, or he may be compelled, on request, to read the deposition to the jury.⁴ A failure to examine all the witnesses who are named in the commission will not render the depositions of those actually examined invalid; nor need an officer employ an interpreter if an attorney of one of the parties is able to translate the answers to his satisfaction.⁵

§ 361. **Statutes construed — The certificate.**—The statutory right to take depositions being in derogation of common-law rules, it has been considered that the statute should be strictly construed, particularly in view of the fact that such evidence, if taken *ex parte* and without notice, may easily be distorted and employed to deceive the jurors and subvert the proper administration of justice.⁶ Whether in any case a deposition is necessary is a question for the court, and clear proof should be required that the witness cannot attend in person before the commission should issue.⁷ The certificate of the judicial officer taking the deposition is usually sufficient *prima facie* evidence of his authority to do so,⁸ of the reason and necessity for taking the deposition,⁹ and of the actual domicile of deponent.¹⁰

¹ Prouty v. Ruggles, 2 Story, 194.

² Andrews v. Parker, 48 Tex. 94.

³ Babb v. Aldrich, 45 Kan. 218; Beal v. Thompson, 8 Cranch, 70; Travers v. Jennings (S. C., 1893), 17 S. E. Rep. 849.

⁴ Linfield v. Old Colony R. R. Co., 10 Cush. 570.

⁵ Schunior v. Russell, 83 Tex. 33.

⁶ Stebbins v. Duncan, 108 U. S. 45; Jones v. Neale, 1 Hughes C. C. 268; Walsh v. Rogers, 13 How. 286, 287; Greening v. Keel, 84 Tex. 326 (answers privately supplied to witness by party). Cf. Moore v. Robertson, 62 Hun, 623.

⁷ Everett v. Tidball, 34 Neb. 803;

Turnbull v. Laubagh, 6 Kulp, 368;

Whitford v. Clark Co., 119 U. S. 522.

⁸ Fowler v. Merrill, 11 How. 375;

Hoyt v. Hammekin, 14 How. 346;

Littlehale v. Dix, 11 Cush. 365;

Palmer v. Fogg, 35 Me. 368; McNeal

v. Brann, 21 Oreg. 218; Schunior v.

Russell, 83 Tex. 83; Curtis v. Curtis,

131 Ind. 489.

⁹ West Boylston v. Sterling, 17

Pick. 126; Kinney v. Berran, 6 Cush

304; Littlehale v. Dix, *supra*.

¹⁰ Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 602.

§ 362. **Objections to depositions.**— Objections to depositions should be promptly made immediately upon discovery of defects where the objection is only to the irregular or improper manner or form in which they were taken, and which is remedial by a retaking,¹ and a failure to object until trial may constitute a waiver.² But substantial objections either to the incompetency of the witness or the irrelevancy of the evidence may be interposed at the trial.³ If the witness is incompetent because of interest when his deposition is taken, it is not admissible at the trial though he may have released his interest in the meantime.⁴ The deposition of a competent witness is not rendered admissible by his subsequent incompetency.⁵

Parol evidence is inadmissible to show the reason for taking the deposition where the statute requires that to appear in the certificate;⁶ nor will a deposition be admissible which is written down by a party or his counsel,⁷ or by a third person, where the law directs that it shall be reduced to writing by the officer or the witness.⁸ Motions to suppress depositions after they have been opened are in the discretion of the court;⁹ nor can a party object to the suppression of a deposition which would not benefit his case.¹⁰

In introducing depositions in evidence it is usually con-

¹ *Bell v. Jamison*, 102 Mo. 71; *by statute before the trial. Haynes Harris v. Nations*, 79 Tex. 409; *v. Rowe*, 40 Me. 181.

Leavitt v. Baker, 82 Me. 28; *Barnum v. Barnum*, 42 Md. 251; *Mer. Dis. Co. v. Leysor*, 89 Ill. 48; *Leslie v. Leslie*, 110 Mo. 31; *Vilmar v. Schall*, 61 N. Y. 564; *Orr v. Hance*, 44 Mo. App. 461; *Johnson v. Railroad Co.*, 51 Iowa, 25.

² *Thompson v. Railroad Co.*, 45 Minn. 13; *Sheldon v. Bury*, 39 Ill. App. 154; *Howard v. Stillwell*, 139 U. S. 199.

³ *Fielden v. Lahens*, 2 Abb. App. Dec. 111; *Chase v. Garretson*, 54 N. J. L. 42; *Nobles v. Hogg*, 36 S. C. 322.

⁴ *Reed v. Rice*, 25 Vt. 171. *Contra* where the incompetency is removed

⁵ *Sabine v. Strong*, 6 Met. 270. *Contra, Messimer v. McCrary* (Mo., 1893), 21 S. W. Rep. 17.

⁶ *Chase v. Garretson*, 54 N. J. L. 42.

⁷ *Cook v. Shorthill*, 82 Iowa, 277.

⁸ *East Tenn., V. & G. R. Co. v. Arnold*, 89 Tenn. 107. A deposition taken on a typewriter is "reduced to writing." *Behrensmyer v. Kreitz*, 135 Ill. 59.

⁹ *Smith v. The Serapis*, 49 Fed. Rep. 393; *Lewis v. Fish*, 40 Ill. App. 372; *Zogan v. Hamilton*, 90 Ala. 454; *Ervin v. Bevil*, 80 Tex. 332; *Goldmark v. Metro. Opera H. Co.*, 67 Hun, 652.

¹⁰ *Cowen v. Eartherly* (Ala., 1892), 11 S. Rep. 195.

sidered necessary to prove that a commission had issued. This should be proved by the production of the commission itself. The production of the interrogatories, while always advisable, may be dispensed with, though the answers may be less easily comprehended because of the absence of the questions.¹ Both affidavits and depositions, which, by actual filing, have become a part of the record, may be proved in other courts by the means adopted in proving judicial records.²

§ 363. Use of depositions as evidence.—A deposition once admitted may be used by either party as evidence in the action,³ and the party in whose behalf it was taken may contradict it if offered by his adversary.⁴ But an extract from a deposition cannot be read unless the whole is in evidence;⁵ nor can a deposition which has been taken for use in one cause be introduced as evidence in a subsequent proceeding unless the parties in both cases are substantially identical.⁶ The presence of the witness in court does not of necessity prevent the court from allowing his deposition to be read in evidence.⁷

§ 364. Equitable bills to perpetuate testimony.—Where a party has a vested or contingent right to be enforced in a future action he may bring a bill in equity to obtain the evidence of an aged or feeble witness, or of one who is about to leave the jurisdiction. The commission is issued and executed in the same manner and form as commissions to take other

¹ 1 Greenl. on Ev., § 517; *Rowe v. Brenton*, 8 B. & C. 737, 765.

² See § 146.

³ *Watson v. Race*, 46 Mo. App. 546; *First Nat. Bank v. Forest*, 44 Fed. Rep. 246; *Rucker v. Reid*, 36 Kan. 470.

⁴ *Bloomington v. Osterle*, 139 Ill. 120.

⁵ *Lanahan v. Lawton* (N. J. Ch., 1892), 23 Atl. Rep. 476; *Thomas v. Miller*, 151 Pa. St. 482. Cf. *Jacksonville, etc. Co. v. Southworth*, 32 Ill. App. 307. It is provided by statute in some of the states that the books of a private corporation may be proved by depositions taken outside of the jurisdiction in the case of a

foreign corporation whose principal office is out of the state. *King v. Enterprise Ins. Co.*, 45 Ind. 43; New York Laws 1869, ch. 589, and Laws 1863, ch. 206. See, also, Code Civ. Pro., §§ 3343 and 929-931.

⁶ *Choate v. Huff* (Tex., 1892), 18 S. W. Rep. 87; *Sewall v. Robbins*, 139 Mass. 164; *McClaskey v. Barr*, 47 Fed. Rep. 154; *Fearn v. West Jersey Ferry*, 143 Pa. St. 122; *Stewart v. Register*, 108 N. C. 588; *Hewlette v. George*, 68 Miss. 703.

⁷ *O'Conner v. Curtis* (Tex., 1892), 18 S. W. Rep. 953; *Page v. Krekey*, 63 Hun, 629; *O'Conner v. Andrews*, 81 Tex. 28.

depositions, and the evidence may be used when the litigation arises. The party must have a fixed interest which is recognized and maintainable at law, though it may be contingent or conditional.¹ So, though the rule has been changed by statute in England,² an heir could not procure a commission to perpetuate testimony in respect to the possibility of an interest which he may acquire in the property of his ancestor.³ The interest of the orator may be in any property, real or personal,⁴ but must be such an interest as could not be the subject of an immediate action, for if there is shown no reason why the testimony should be perpetuated the suit will not be entertained.⁵ The testimony having been obtained, the suit is at an end, and the deposition will be filed or recorded only when the suit in which it is to be used is commenced or on the death of the witness.⁶

¹Townsend Peerage Cases, 10 Cl. & Fin. 289; Belfast v. Chichester, 2 J. & W. 451; Dursley v. Fitzhardinge, 6 Ves. 251; Allan v. Allan, 15 id. 134.

²Campbell v. Earl of Dalhousie, L. R. 1 H. Sc. App. 462.

³In re Tayleure, L. R. 6 Ch. 416; Sackville v. Ayleworth, 1 Vern. 105.

⁴Earl of Suffolk v. Green, 1 Atk. 450.

⁵Angell v. Angell, 1 S. & S. 83; Ellice v. Roupell, 32 Beav. 299; Earl Spencer v. Peck, L. R. 3 Eq. 415.

⁶Attorney-General v. Ray, 2 Hare, 518; Angell v. Angell, 1 S. & S. 63; Barnsdale v. Lowe, 2 Russ. & My. 142; Beavan v. Carpenter, 11 Sim. 22.

CHAPTER XXVI.

RECEPTION OF EVIDENCE—NUMBER OF WITNESSES.

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§ 366. Mode of offering and objecting to evidence.—An offer of evidence should not be too broad, general or vague in character. It should be specific in terms, pointing out clearly the facts which are intended to be proved under it,¹ so that the court may judge of the materiality of the evidence. The burden of showing the materiality of any evidence which is

¹ *Lyon v. Batz*, 42 Mo. App. 606; *Jackson* (Ind., 1893), 32 N. E. Rep. 793; *Carley v. Railroad Co.*, 48 Hun, Rep. 569; *Kennedy v. Currie*, 3 619; *Wolford v. Farnham*, 47 Minn. Wash. St. 442; *Brelscher v. Treitske*, 95; *Chicago, etc. Co. v. Debaum*, 2 33 Neb. 699; *Winchell v. Express Ind. App.* 281.
Co., 61 Vt. 15; *Toledo, etc. Co. v.*

offered is upon the party offering it, and unless he shall convince the court that the evidence is material and relevant to the issue no error is committed by the court in excluding it. Hence, the purpose of the party in introducing evidence must clearly appear in order that an exception to its exclusion may be taken advantage of by him upon appeal.¹ The adverse party has the right to demand, except where the witness is under strict cross-examination, that counsel shall state concisely the substance of what he proposes to prove by the witness. If he request it, and if he does not then the court of its own motion, may require the purpose of the question to be shown before it is answered and not after the objection to the answer as it is given has been sustained,² though if the competency of the evidence is ascertainable only after the answer has been given, it should be allowed subject to objection by the adverse party.³ If evidence is offered by a party as a whole, it is not error for the court to reject all of it where it clearly appears that a part of it is inadmissible, and the facts which are susceptible of proof or which are relevant cannot be readily separated from those which are not.⁴ And where evidence is offered for a particular purpose, it is not error to receive it over a general objection that it is not admissible for any purpose, if it was admissible for any purpose though not for the purpose which was specified.⁵

Again, evidence which is originally offered without any limitation as to its purpose, when, on objection, its purpose

¹ *Smethurst v. Propes*, 148 Mass. 261; *Atherton v. Atkins*, 139 Mass. 61; *Lahn v. Gustafson*, 73 Iowa, 633; 35 N. W. Rep. 660; *Masters v. Marsh*, 19 Neb. 458; *Hamilton v. Ross*, 23 id. 630; *White v. Spreckels*, 75 Cal. 610; *Dwyer v. Rippetoe*, 72 Tex. 520; *Hathaway v. Tinkham*, 148 Mass. 85; *Cheek v. Herndon*, 82 Tex. 146; *Johnson v. Merry*, 53 Fed. Rep. 569; *Lauter v. Simpson*, 2 Ind. App. 293; *Hurlbut v. Hurlbut*, 63 Vt. 667.

² *Chicago, etc. Co. v. Debaum*, 2 Ind. App. 281.

³ *Gunn v. Ohio Riv. Co.*, 37 W.

Va. 421; *Carley v. New York, etc. Co.*, 1 N. Y. S. 637.

⁴ *Clark v. Ryan* (Ala., 1893), 11 S. Rep. 22; *Reynolds v. Franklin*, 47 Minn. 145; *First Nat. Bank v. North* (S. D.), 51 N. W. Rep. 96; *Cincinnati, etc. Co. v. Roesch*, 126 Ind. 445; *Over v. Schiffing*, 102 id. 691; *Beard v. First Nat. Bank*, 41 Minn. 153. Cf. *Gorsuch v. Rutledge*, 70 Md. 272.

⁵ *Charleston Ice Mfg. Co. v. Joyce* (C. C. A.), 54 Fed. Rep. 332; *Giles v. Vandiver* (Ga., 1893), 17 S. E. Rep. 115; *Odell v. Metro. El. R. Co.*, 22 N. Y. S. 737; *Parsons v. New York Cent. R. R. Co.*, 112 N. Y. 355

is stated, becomes admissible for all legitimate purposes when a further objection is made and overruled that it is not admissible for any purpose.¹ It is discretionary with the court to call either for a distinct statement of the purpose and materiality of the evidence, or to let these elements appear from the tenor of the question itself.² If the question upon its face clearly calls for evidence which is irrelevant or otherwise inadmissible, the court has the right to rule it out at once, and it may treat the matter as concluded and refuse to listen to counsel in case they attempt to show by argument that the answer which is called for is not incompetent evidence. It is always within the sound discretion of the court to reject oral evidence which is offered under circumstances from which the inference may be drawn that the offer was not made in good faith.³ Among circumstances which are calculated to excite suspicion is the absence from court of the witness who is expected to give the oral evidence.

Again, the court may, and perhaps should, require that the evidence shall be offered so that it will not be heard by the jurors, where it is likely that they will be prejudiced thereby in case it is pronounced inadmissible.⁴ If, however, the jury are plainly instructed to disregard the evidence which is offered in their hearing if it shall be deemed incompetent, no error is committed by allowing them to hear it as offered, or to be present during the argument upon the question of its admissibility.⁵

An objection to evidence, to be sufficient, should be specific, pointing out clearly to the court the nature of the objection and the particular grounds upon which the rejection of the evidence is sought, or an exception will not be available.⁶ A general

¹ *Sears v. Starbird*, 78 Cal. 225.

² *Osgood v. Bauder* (Iowa, 1891), 47 N. W. Rep. 1001; *Hathaway v. Tinkham*, 148 Mass. 85.

³ *Scotland Co. v. Hill*, 112 U. S. 183; *Robinson v. State*, 1 Lea (Tenn.), 673.

⁴ *Omaha Coal, etc. Co. v. Fay* (Neb., 1893), 55 N. W. Rep. 211.

⁵ *People v. Smith*, 104 N. Y. 491; 10 N. E. Rep. 873; *State v. Cain*, 20

W. Va. 679; *State v. Wood*, 53 N. H. 484.

⁶ *Ohio & M. R. Co. v. Walker*, 113 Ind. 196; *Noftsgcr v. Smith* (Ind., 1893), 32 N. E. Rep. 1024; *Smith v. Morrill*, 39 Kan. 665; 18 Pac. Rep. 915; *Carroll v. O'Shea*, 21 N. Y. S. 956; *Godfrey v. Knodle*, 44 Ill. App. 638; *Brown v. Wakeman*, 18 N. Y. 263; *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Mooney v. Peck*, 49 N.

objection that the evidence is "incompetent, immaterial and irrelevant" will not suffice.¹

Upon an appeal or a motion for a new trial no other objections can be urged than those which were put forward on the trial.² A party whose evidence has been rejected must, in order to have a review on appeal, take an exception to the action of the court after a formal tender and objection, which exception should be noted by the judge or by the court stenographer for him. The exception should be plainly and specifically stated in the bill of exceptions over the signature of the party or his counsel, and the bill should be examined by the judge, who should also sign it if it is true.³

Where an assignment of error is required to be contained in the transcript of the record, in the case on appeal or in the appellant's brief, it must point out the particular erroneous rulings of the trial court on the evidence; for a mere statement that the court erred in overruling all of appellant's objec-

J. L. 232; *Linton v. Allen*, 154 Mass. 432; *Tilley v. Blivens*, 110 N. C. 343; *Helena v. Albertose*, 8 Mont. 499; *Drew v. Drum*, 44 Mo. App. 25; *Briggs v. Jones*, 46 Minn. 277; *Williams v. Clink*, 90 Mich. 297; *Hogan v. Stuart*, 11 Mont. 498.

¹ *Stringer v. Frost*, 116 Ind. 477; *Johnson v. Brown*, 130 Ind. 61; *Churchman v. Kansas City*, 49 Mo. App. 366; *Alcorn v. Railroad Co.*, 108 Mo. 81; *Evans. R. Co. v. Fettig*, 130 Ind. 61; *Rupert v. Penner*, 35 Neb. 587; *Chicago, etc. Co. v. Behmeyer*, 48 Kan. 47. An objection to an expert witness must clearly point out the incompetency of his evidence. *Mortimer v. Met. E. R. Co.*, 129 N. Y. 84; *Jefferson v. New York El. R. Co.*, 132 id. 483.

² *Bailey v. Chicago, M. etc. Co.* (S. D., 1893), 54 N. W. Rep. 596; *Falk v. Gast Lith. Co.*, 54 Fed. Rep. 390; *Whitaker v. White*, 69 Hun, 258; *Wilson v. Railroad Co.*, 114 N. Y. 487; *Haviland v. Man. R. Co.*, 61 Hun, 626; 131 N. Y. 630; *Toplitz v.*

Heddens, 146 U. S. 252; *Little Rock v. Railroad Co.*, 56 Ark. 495; *Chandler v. Beal*, 132 Ind. 596; *Hommedieu v. Railroad Co.*, 120 Ind. 435.

³ *Hartsock v. Mort*, 76 Md. 281; *Connell v. O'Neill*, 154 Pa. St. 532; *Welborn v. Atl. R. Co.* (Ga., 1893), 17 S. E. Rep. 672. As to the paramount necessity for a bill of exceptions, see *Brooke v. Tradesmen's Bank*, 68 Hun, 129; *Cramer v. Akin*, 49 Mo. App. 163; *Pace v. Lanier* (Fla., 1893), 13 S. Rep. 363; *Spangenberg v. Charles*, 44 Ill. App. 526; *State v. Cent. P. R. R. Co.*, 17 Nev. 259; *Whidby Land Co. v. Nye*, 5 Wash. St. 501; *Pedrosena v. Hotchkiss*, 95 Cal. 636; *Bray v. Kemp* (Mo., 1893), 21 S. W. Rep. 220; *Lusk v. Parsons*, 39 Ill. App. 380; *Elmer v. Marsh*, 3 Ind. App. 558; *Schneider v. Tombling*, 34 Neb. 661. The bill of exceptions should contain all the evidence where insufficiency of evidence is alleged. *Texas, etc. Co. v. Cox*, 145 U. S. 593. See, also, note 1, p. 558, *post*.

tions will not suffice.¹ The evidence itself should be stated and the action of the court thereon clearly described. A party has no right to speculate on the effect of evidence. He should not be permitted to maintain silence in case the inadmissible evidence, which was introduced by his adversary without objection, proves favorable to himself, and move to strike it out if, on the other hand, it turns out more favorably to his adversary. Hence, the reception of inadmissible evidence is not ground for a new trial because the jury was not warned to disregard it, unless the party objected promptly when the evidence was offered and took an exception in case his objection was overruled.² If evidence is rejected on the trial because it was irrelevant or otherwise improper for the purpose for which it was offered, a new trial will not be granted because it has been subsequently discovered that the evidence would have been admissible on other grounds or for another purpose, unless the party who appeals or moves for a new trial shall show that he was not in fault in the matter and that he has been unjustly and substantially prejudiced by its admission.³

§ 367. Waiver of objections to evidence—Necessity for repeating objections.—Objections to the admission of evidence should be promptly made; for if a party is negligent in permitting the evidence to be placed before the jury without making any objection, his laches may debar him from a new trial, even though he may have moved to suppress it before

¹ *Weston v. Moody*, 29 Fla. 169; *Graham v. McReynolds*, 90 Tenn. 673; *Haines v. Savies*, 93 Mich. 440; *Union Bldg. Ass'n v. Insurance Co.*, 83 Iowa, 647; *Mitchell v. Mitchell*, 84 Tex. 803; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Herbert v. Duffur* (Oreg., 1893), 32 Pac. Rep. 502; *Robertson v. Coates*, 1 Tex. Civ. App. 664; *McElroy v. Braden*, 152 Pa. St. 78; *Reese v. Coffey* (Ind., 1893), 32 N. E. Rep. 720.

² *Cleveland, etc. Co. v. Wynant* (Ind., 1893), 34 N. E. Rep. 569; *In re Gannon's Wills*, 2 Misc. Rep. 329; *W. U. T. Co. v. Lindley*, 89 Ga. 484; *Dee v. Sharon Hill Acad.*, 2 Pa. Co. Ct. Rep. 228; *Boughton v. Smith*, 67 Hun, 652; *People v. Cronise*, 51 Hun, 489;

Allen, 100 N. C. 131.

³ *Tuomey v. O'Reilly*, 22 N. Y. S. 930; *Higginbotham v. Campbell* (Ga., 1893), 15 S. E. Rep. 797; *Haines v. Thompson*, 2 Misc. Rep. 385; *Sullivan v. Sullivan* (Ind., 1893), 32 N. E. Rep. 1132.

trial, as in the case of a deposition which is read to the jury,¹ or, where the witness is permitted to answer an immaterial or irrelevant question, he has moved to strike out the answer.² Where a witness has testified to certain facts without any objection, an objection to the admission of similar or cumulative evidence from him or from another witness will be deemed waived by the party's silence.³ On the other hand, where objections to the general competency of the witness, or to the admissibility of his testimony in its entirety, or to a certain portion of it consisting of similar questions, have been promptly made and overruled, counsel is under no necessity of repeating his objections indefinitely, either to the competency of the witness or to the relevancy or admissibility of any questions which may be included legitimately in the prior objections.⁴ The party over whose objection evidence is received should demand an express ruling by the court upon his exception taken thereto, for if no rulings appear upon the record it will be presumed that the party waived his right to take an exception to evidence which he claims was inadmissible.⁵

In conformity with the general rule that objections not promptly made will be deemed to have been waived, it is held that objections to evidence cannot be urged on a trial *de novo* in an appellate court which were not interposed in the court below.⁶ An objection to the reception of evidence may be

¹ Union Pac. Ry. v. Reese, 56 Fed. Rep. 569.

² Cleveland, etc. Co. v. Wynant (Ind., 1893), 34 N. E. Rep. 569; Omaha So. Ry. Co. v. Beeson (Neb., 1893), 54 N. W. Rep. 557; Chandler v. Beall, 132 Ind. 596; Scott v. Metro. El. R. Co., 21 N. Y. S. 631; Dallmeyer v. Dallmeyer (Pa., 1888), 16 Atl. Rep. 72; Hughes v. Ward, 38 Kan. 452; Lewars v. Weaver, 121 Pa. St. 268. *Contra*, Jones v. State, 118 Ind. 39.

³ Pharo v. Beadleston, 21 N. Y. S. 989; Denver & R. G. Co. v. Morrison (Colo., 1893), 32 Pac. Rep. 859; Shrimpton v. Philbrick (Minn., 1893), 55 N. W. Rep. 551; Bank v. Inman (Ind., 1893), 34 N. E. Rep. 21; Payne

v. Miller, 89 Ga. 73; Brice v. Miller, 35 S. C. 537.

⁴ Gilpin v. Gilpin, 12 Colo. 504; Sharon v. Sharon, 79 Cal. 633; Whitney v. Traynor, 74 Wis. 289; In re Eysamon, 113 N. Y. 62. If either party without objection introduce a part of a conversation in evidence, his adversary will not be considered to have thereby waived his right to object to the residue if the part already called out was irrelevant. People v. White, 14 Wend. (N. Y.) 111.

⁵ Shroder v. Webster (Iowa, 1892), 55 N. W. Rep. 569; Taliaferro v. Lee (Ala., 1893), 13 S. Rep. 125; Burdin v. Trenton (Mo., 1893), 22 S. W. Rep. 728.

⁶ The cases are very numerous.

waived by the party who has objected to it introducing evidence by his own witnesses bearing upon the same fact or transaction to which the objectionable evidence related.¹ But cross-examining the adverse witness who has given the objectionable evidence is not a waiver.² Thus where a party, after objecting that his witness was not properly examined to lay a foundation for showing contradictory statements, recalls the witness and proceeds to examine him as regards the same statements, he waives the objection.³

§ 368. Motions to strike out evidence.—If a party's objection to evidence is overruled, or in case evidence is received upon the strength of a promise by the party that he will show its relevancy, and he fails to do so, and in certain circumstances if the party, being without fault, has failed to object before the witness has answered, he should move to strike out the answer, stating specifically the grounds upon which his motion to strike out is based. His failure to move to strike out will deprive him of his right to urge the erroneous admission of the evidence on an appeal.⁴ The motion

The following may be cited: *Brown v. Foster*, 20 S. W. Rep. 611; 112 Mo. 297; *Paine v. Trask*, 56 Fed. Rep. 233; *West Side Bank v. Meehan*, 66 Hun, 627; *Van Kamen v. Roes*, 65 Hun, 625; *Rupert v. Penner*, 35 Neb. 587; *id.* 803; 53 N. W. Rep. 892; *Wilkinson v. Ward*, 42 Ill. App. 541; *Chicago v. Edson*, 43 *id.* 417; *Brand v. Servass*, 11 Mont. 86; *Barnes v. Scott*, 29 Fla. 285; *Benner v. Dredging Co.*, 134 N. Y. 456; *Merrill v. Floyd*, 2 C. C. A. 58.

¹ *Doyle v. Kansas City Ry. Co.* (Mo., 1893), 20 S. W. Rep. 970.

² *Pugh v. Ayres*, 47 Mo. App. 490.

³ *Gaffney v. People*, 50 N. Y. 423; *People v. Weldon*, 111 N. Y. 596.

⁴ *Pennsylvania, etc. Co. v. Cook*, 123 Pa. St. 170; *Link v. Sheldon*, 136 N. Y. 1; *Doren v. Jelliffe*, 20 N. Y. S. 636; *Payne v. Dicus* (Iowa, 1893), 55 N. W. Rep. 483; *Tuomey v. O'Reilly*, 22 N. Y. S. 930; *Cleveland, etc. Co. v. Aherns*, 42 Ill. App. 434;

Riche v. Martin, 20 N. Y. S. 693; *Flynn v. Manhattan Co.*, 20 *id.* 652; *Vannatta v. Duffy* (Ind., 1893), 30 N. E. Rep. 807; *Partridge v. Russell*, 50 Hun, 601; 2 N. Y. S. 529; *Turner v. Newberg*, 109 N. Y. 301; *Reiley v. Haynes*, 38 Kan., 259; *Delamater v. Prudential L. Ins. Co.*, 5 N. Y. S. 536; *Kilpatrick v. Dean*, 4 N. Y. S. 708. In some states it is held that where no objection has been made to the reception of incompetent evidence, the court is not bound to order it to be stricken out, but may, on request, direct the jury to disregard the objectionable evidence. But it is also held in the same jurisdiction that the court may strike evidence of its own motion; and where incompetent evidence has been stricken out it is not error for the court to omit to direct the jury to disregard such evidence, though, if requested, this instruction should be given, and, even in the absence of

should be confined strictly to that portion of the testimony which is objectionable, and the denial of a general motion to strike out all the witness has said will be sustained on appeal where a part of his evidence was clearly admissible.¹ A motion to strike out, made after all the evidence is in, comes too late;² nor is such a motion proper upon the sole ground of the insufficiency of evidence, the proper remedy being a demurrer or a motion to direct a verdict.³ If the evidence which is given by the witness is irresponsive,⁴ or irrelevant,⁵ or if it appears that he has no knowledge of the matter⁶ upon which he is interrogated, a denial of a motion to strike out is reversible error. So, also, when by consent the cross-examination of a material witness is suspended on his promise that he will attend for further cross-examination when he is wanted, it is error, for which a new trial should be granted, for the court to refuse to strike out his testimony if he fails to appear as promised.⁷

A motion to strike out is properly denied where the sole ground on which it is based is the unfavorable character of an answer which a party has elicited from his own witness in reply to a relevant and proper question.⁸

any request, it is the better practice for the court to do so. *Platner v. Platner*, 78 N. Y. 90; *Gall v. Gall*, 114 N. Y. 109.

¹ *Fleming v. Shepherd*, 83 Ga. 338; *Davis v. Hopkins* (Col., 1893), 32 Pac. Rep. 70; *Waymire v. Lank*, 121 Ind. 1; *Moore v. McDonald*, 68 Md. 331; *Wilson v. Equitable Gas Co.*, 152 Pa. St. 566; *Miller v. Windsor W. Co.*, 148 Pa. St. 429; *Buford v. Shannon* (Ala., 1893), 10 S. Rep. 263; *Carrico v. West Vir., etc. Co.*, 35 W. Va. 689; *Roberts v. Burgess*, 85 Ala. 192; *Binford v. Young*, 115 Ind. 174; *Bamford v. Iron Co.*, 33 Fed. Rep. 677.

² *Kansas, etc. Co. v. Phillips* (Ala., 1893), 13 S. Rep. 265; *Falvey v. Jackson*, 132 Ind. 176; *Overby v. Ches. & O. R. Co.*, 37 W. Va. 524.

³ *Wilcox v. Stephenson*, 30 Fla. 377.

⁴ See § 336; *Stillwell v. Patton*, 108 Mo. 352.

⁵ *Williams v. Klink*, 90 Mich. 297; *Chester v. Bakersfield*, 64 Cal. 42; *Gainard v. Rochester City R. R. Co.*, 2 N. Y. S. 470.

⁶ *Bishop v. Hendrickson*, 16 N. Y. S. 799; *Bronson v. Leach*, 42 N. W. Rep. 174; 74 Mich. 713.

⁷ *Mathews v. Mathews*, 53 Hun, 244; 6 N. Y. S. 589.

⁸ *East Tenn. etc. Co. v. Turvaille* (Ala., 1893), 12 S. Rep. 63; *Central R. & Banking Co. v. Ingram* (Ala., 1893), 12 S. Rep. 801; *Smith v. Zeigler*, 63 Hun, 624; *Silberstein v. Houston, W., St. & P. F. R. Co.*, 4 N. Y. S. 843.

§ 369. **The improper admission of evidence, when immaterial.**—If it is clearly shown *beyond all doubt* that the evidence which has been improperly admitted did not and could not have had any possible effect upon the jury because of its admission, a new trial should not be granted.¹ The irrelevancy or immateriality of evidence which was admitted is not ground for a new trial if its admission is not affirmatively shown to have influenced the verdict.² So it has been laid down as a general rule that if the verdict is rendered upon a preponderance of sufficient, satisfactory or uncontradicted relevant and competent evidence, it is never material how much irrelevant or otherwise incompetent or inadmissible evidence has been received.³

¹ Williams v. Fresno Canal & Irr. Co., 30 Pac. Rep. 961; 96 Cal. 14; Van Kamen v. Roes, 65 Hun, 625; Indianapolis Cabinet Co. v. Herrman (Ind., 1893), 34 N. E. Rep. 579; Mitchell v. Bradstreet Co. (Mo., 1893), 22 S. W. Rep. 724, Montross v. Eddy, 53 N. W. Rep. 916; 94 Mich. 100; Angell v. Hill, 18 N. Y. S. 824; Cassin v. La Salle County, 21 S. W. Rep. 122; 1 Tex. Civ. App. 127; Reed v. Stapp, 52 Fed. Rep. 641; 3 C. C. A. 244; 9 U. S. App. 34; Smith v. Sun Pub. Co., 55 Fed. Rep. 240; Grundies v. Kelso, 41 Ill. App. 200; North Chicago, etc. Co. v. Cook, 43 id. 634; Peck v. Hutchison (Iowa, 1893), 55 N. W. Rep. 511; Wayne v. Blun (Ga., 1893), 17 S. E. Rep. 288.

² People v. Duffie, 62 Mich. 487; Dibble v. Dimick, 23 N. Y. S. 680; 4 Misc. Rep. 190; Foster v. Oldham, 23 N. Y. S. 1024; 4 Misc. Rep. 201. So permitting an incompetent witness to testify is not error where his evidence is wholly cumulative. Travis v. Continental Ins. Co., 47 Mo. App. 472; Chicago, etc. Co. v. Bivans (Ill., 1893), 32 N. E. Rep. 456; Reed v. New, 39 Kan. 727; Connor v. City of New York, 19 N.

Y. S. 85; Dawson v. Schloss, 93 Cal. 194; 29 Pac. Rep. 31; Phoenix Ins. Co. of London v. Freedman (Tex., 1893), 19 S. W. Rep. 1010; In re Gannon's Will, 21 N. Y. S. 960; Larson v. Lombard Inv. Co. (Minn., 1893), 53 N. W. Rep. 179; Miller v. James (Iowa, 1893), 53 N. W. Rep. 227; Lane v. Lane (Mo., 1893), 21 S. W. Rep. 99.

³ Wolfe v. Underwood (Ala., 1893), 12 S. Rep. 234; Keely v. Andrew (Colo., 1893), 32 Pac. Rep. 175. The admission of the evidence of an expert, who was incompetent, upon a question of value is not error when his estimate was lower than the verdict recovered. Bramble v. Hunt, 68 Hun, 204. The admission of irrelevant evidence is not error if no finding is based on it (In re Countryman's Estate, 151 Pa. St. 577; 25 Atl. Rep. 146; 31 W. N. C. 148; Cahill v. Murphy, 30 Pac. Rep. 195; 94 Cal. 129; Harrington v. Harrington, 154 Mass. 517; Alcorn v. Chicago & A. R. Co., 108 Mo. 81; 18 S. W. Rep. 188; Theodorsen v. Ahlgren, 37 Ill. App. 140), or if the record does not show that it was submitted or read to the jury. In re

Again, as respects the proof of particular facts considered apart from the question of a preponderance of the evidence in the whole case, it has been held that the admission of incompetent evidence tending to prove such facts is not reversible error where they were admitted or have been proved by satisfactory evidence of a different description.¹ Thus the exclusion or admission of evidence to prove any particular facts, the truth of which is admitted by either party in his pleadings, is immaterial.²

The admission of irrelevant, immaterial or otherwise inadmissible evidence in a trial by the court without a jury, though perhaps improper, is not ground for reversal on an appeal, the theory of the law being that the court will not permit itself to be influenced in its findings of fact by such incompetent evidence.³

§ 370. The improper exclusion of evidence, when immaterial.—The improper rejection or exclusion of competent evidence by the court in a jury trial is no ground for reversal

Westerfield, 96 Cal. 113; 30 Pac. Rep. 1104.

¹ Connor v. City of New York, 19 N. Y. S. 85; 64 Hun, 635; Symes v. Exchange Bank, 48 Kan. 713; Vulcanite Paving Co. v. Ruch, 147 Pa. St. 251; 25 Atl. Rep. 555; Phoenix Ins. Co. v. Pickel, 3 Ind. App. 332; 29 N. E. Rep. 432; Dawson v. Schloss, 93 Cal. 194; Stanton v. Esty Mfg. Co., 90 Mich. 12; 51 N. W. Rep. 101; Reid v. New York, N. H. & H. R. Co., 63 Hun, 630; Searles v. State, 6 Ohio Cir. Ct. Rep. 331; Eastis v. Montgomery, 93 Ala. 293; McKay v. Riley, 135 Ill. 586; People v. Fong Ah Sing, 70 Cal. 8; Pensacola, etc. Co. v. Anderson, 26 Fla. 425; State v. Conable, 81 Iowa, 60; Hunter v. McElhanney, 48 Mo. App. 234; McGarry v. Averill, 50 Kan. 362; Montgomery v. Hinds (Ind., 1893), 33 N. E. Rep. 1100; Grout v. Cottrell, 67 Hun, 650; Dorsheimer v. Glenn, 51 Fed. Rep. 404; 2 C. C. A. 309; 4 U. S. App.

500; Seligman v. Rogers (Mo., 1893), 21 S. W. Rep. 94; Greer v. Laws, 56 Ark. 37. Thus the admission as evidence of a memorandum used to refresh the memory of a witness, who then testifies fully to all the matters referred to in the memorandum, is not erroneous. Butler v. Chicago, etc. Co. (Iowa, 1893), 54 N. W. Rep. 208.

² Hartman v. Louisville, etc. Co., 48 Mo. App. 619; Rosenbaum v. Russell, 53 N. W. Rep. 384; 35 Neb. 513; Consaul v. Sheldon, 52 N. W. Rep. 1104; 35 Neb. 247; Greenspau v. American Star Order, 20 N. Y. S. 945; Heinlein v. Heilbron (Cal., 1893), 31 Pac. Rep. 838.

³ Markell v. Mathews (Colo., 1893), 32 Pac. Rep. 176; St. Louis, A. & T. Co. v. Turner, 1 Tex. Civ. App. 625; Baker v. Smith (Ga., 1893), 15 S. E. Rep. 788; Kleiman v. Geiselman (Mo., 1893), 21 S. W. Rep. 796; Laumeier v. Gehner, 110 Mo. 122; White v. White, 82 Cal. 427; Rat-

where it would not, if admitted, have resulted in bringing about a different verdict than was rendered. If the probative force of the excluded evidence is very slight, or if its credibility is doubtful, or its relevancy so remote that it is very clear that it would not have affected the result in case it had been permitted to go to the jury, its exclusion, though improper, is not reversible error, as neither party is prejudiced thereby.¹ If, however, the exclusion of the competent evidence resulted in preventing the case from going to the jury, or if the evidence was thereby caused so to preponderate in favor of the successful party that the verdict as rendered by the jury was the direct result of keeping the competent evidence from their consideration, then a serious injustice has been done, and the party who is prejudiced by the erroneous ruling of the court should have a new trial.² But an erroneous ruling by which competent and material evidence is excluded will always be deemed cured by its subsequent admission before the verdict is rendered.³ If the evidence is excluded on the direct examination of the witness, the error is cured when it is subsequently elicited during his cross-examination.

cliffe v. County Court, 36 W. Va. 202.

¹ *Doll v. People* (Ill., 1893), 34 N. E. Rep. 413; *Dexter v. Harrison* (Ill., 1893), 34 id. 46; *Stevenson v. Gunning*, 25 Atl. Rep. 697; 64 Vt. 601; *Higginbotham v. Campbell* (Ga., 1893), 15 S. E. Rep. 797; *Smith v. Mott*, 65 Hun, 625; *Good v. Knox*, 64 Vt. 97; *Barnes v. Denslow*, 9 N. Y. S. 53; *Tischler v. Apple*, 30 Fla. 132; *Taylor v. Dominick*, 36 S. C. 368; *Abbott v. Petersburg Granite Quarry Co.*, 62 Hun, 622; *Hunnicut v. Railroad Co.* (Ga., 1890), 11 S. E. Rep. 580. No error is committed by the exclusion of evidence which is competent to fix liability on a defendant against whom the action is dismissed on other valid grounds where such evidence is wholly irrelevant as to the other defendants against whom judgment is rendered.

Tuomey v. O'Reilly, 22 N. Y. S. 930; 3 Misc. Rep. 302.

² *McNamara v. Corp. of New Melleray* (Iowa, 1892), 55 N. W. Rep. 322; *Haines v. Thompson*, 21 N. Y. S. 991; 2 Misc. Rep. 385.

³ *Gregory v. Coleman* (Tex., 1893), 22 S. W. Rep. 181; *Carpenter v. Knapp*, 66 Hun, 632; *McKenzie v. Oregon Imp. Co.*, 5 Wash. St. 409; *Chicago, etc. Co. v. Wedel* (Ill., 1893), 32 N. E. Rep. 547; *Smalley v. Fullerton* (Iowa, 1893), 55 N. W. Rep. 520; *Tenn. Riv. Transp. Co. v. Kavanaugh* (Ala., 1893), 13 S. Rep. 283; *Pharo v. Beadleston*, 21 N. Y. S. 989; 2 Misc. Rep. 424; *St. Kevin Mining Co. v. Isaacs* (Colo., 1893), 32 Pac. Rep. 822; *Hamilton v. Rich Hill Coal Mining Co.*, 108 Mo. 364; 18 S. W. Rep. 977; *Minnesota S. Ag. Soc. v. Swanson*, 48 Minn. 231; *Jermain v. Tenneas*, 44 La. Ann. 620; *Kelly v. Insurance Co.*, 82 Iowa, 137.

§ 371. Nature and use of stipulations as regards evidence.

A stipulation is an agreement between counsel usually required by statute to be in writing¹ and to be entered upon the minutes of the court,² respecting the carrying on of a case which is in litigation in court. When a stipulation, voluntarily entered into by the parties or by their counsel, is committed to writing and filed with the clerk of the court, it becomes a part of the record, is irrevocable, and both parties are conclusively bound thereby to the same extent and on the same principles as by any other matter constituting an estoppel of record.³ But a stipulation is not binding on persons who became parties to the action after it was entered into by the original parties,⁴ nor will the stipulation be held to estop infant parties unless it is ratified by the court upon affirmative proof that it is not prejudicial to them.⁵

Very frequently, for the purpose of saving time and expense, when a witness is ill or out of the jurisdiction so that his evidence can only be obtained by a commission, or where the point to be proved is collateral, immaterial or uncontradicted, a stipulation is entered into that the witness will testify to certain facts set forth therein, or that the point in question shall be admitted as proved. In the former case the fact that the absent witness appears in court after the party's case is closed,⁶ or the fact that the deposition of the witness subsequently procured is inconsistent with the statement of his evidence contained in the stipulation, does not give the adverse party

¹ Taylor v. Chicago, etc. Co., 80 Iowa, 431; Gulf, C. & S. F. Ry. Co. v. King (Tex., 1891), 16 S. W. Rep. 641.

² Garrigan v. Dickey (Ind. App., 1891), 27 N. E. Rep. 713.

³ Kenton Ins. Co. v. First Nat. Bank (Ky., 1892), 19 S. W. Rep. 841; City of Chicago v. Drexel (Ill., 1892), 30 N. E. Rep. 774; Whalen v. Brennan, 34 Neb. 129; 51 N. W. Rep. 759; Worsham v. McLeod (Miss., 1892), 11 S. Rep. 107; Dilworth v. Curts, 29 N. E. Rep. 861; 139 Ill. 508; Amer. Bank Note Co. v. Man. Ry. Co., 66 Hun, 627; Mahoney v. Marshall, 2

Idaho, 1174. A stipulation as to evidence which is filed in one action is admissible as evidence in a subsequent action between the same parties, though not specially pleaded by the party who offers it. Coubrough v. Adams, 70 Cal. 374; 11 Pac. Rep. 634.

⁴ Kneeland v. Luce, 141 U. S. 487; Midland R. Co. v. Island Coal Co., 126 Ind. 384.

⁵ Eidam v. Finnegan, 48 Minn. 53; 50 N. W. Rep. 933.

⁶ Harris v. McArthur (Ga., 1893), 15 S. E. Rep. 758.

a right to claim that the latter shall be disregarded,¹ or deprive the party in whose behalf the evidence is offered of his right to use it. Though it has sometimes been laid down as a rule that a stipulation ought to be construed most strictly against the party for whose benefit it was made,² yet such an agreement should receive a liberal and reasonable construction by the court, so as to bring about the apparent intention of the parties and to aid in the expeditious administration of justice.³ So it has been held that parol evidence is inadmissible to vary the terms of a stipulation, but that the court should gather its meaning from the whole instrument viewed in the light of all the circumstances in the case.⁴

Where a party has entered into a stipulation that evidence which has been given in a prior proceeding by witnesses who may be unable to attend shall be used in a pending trial, he does not waive his rights under it, in case any witness is subsequently unable to attend, by calling one of these witnesses who may be in court.⁵ Where documentary evidence has been lost and the parties enter into a stipulation that a certain mode of proof shall be adopted in lieu thereof, a substantial compliance with the mode agreed on is all that can be required, and proof as made will not be rejected because not precisely identical in time, place or manner with that which has been stipulated for.⁶ Any stipulation entered into by

¹ *Dickerson v. Mathewson*, 50 Fed. Rep. 73.

² *Heller v. Petterson*, 3 N. Y. S. 257; 18 N. Y. State Rep. 928.

³ *Lally v. Rossman*, 82 Wis. 147; 51 N. W. Rep. 1132; *People v. Cooper*, 139 Ill. 461; 29 N. E. Rep. 872; *Mackay v. Armstrong* (Tex., 1892), 19 S. W. Rep. 463; *Keator v. Colo. Coal & Iron Co.* (Colo., 1893), 32 Pac. Rep. 857; *Davidson v. Felder* (Tex., 1893), 21 S. W. Rep. 714; *Schroeder v. Frey*, 114 N. Y. 266; *Blossom v. Griffin*, 13 N. Y. 569; *Field v. Munson*, 47 id. 221; *Springsteen v. Sampson*, 33 id. 703; *Calkins v. Falk*, 39 Barb. 620; *Otis v. Conway*, 114 N. Y. 113; *Rogers v. Kneeland*, 10 Wend. 219.

⁴ *Schroeder v. Fry*, 12 N. Y. S. 625.

⁵ *Foster's Ex'r v. Dickinson*, 64 Vt. 233; 24 Atl. Rep. 253. A stipulation that evidence given in one case may be read "on the trial" of another case means on any trial, whether first or second (*Herbst v. Vacuum Oil Co.*, 68 Hun, 223); though by signing such a stipulation the party does not waive his right to object to evidence which, though competent in the early trial, is not competent in the later. *Bridgham's Appeal*, 82 Me. 323. *Contra*, *Thompson v. Thompson* (Ala., 1891), 8 S. Rep. 419.

⁶ *Crow v. Gleason*, 20 N. Y. S. 590; 65 Hun, 625. But *cf.* *Keator v. Colorado, etc. Co.* (Colo., 1893), 32 Pac. Rep. 857.

the parties which is equitable and fair to both, which is reasonable in itself and does not contravene public policy or good morals, will be binding on the court.¹ If a stipulation is tainted with fraud, or if it has been entered into by counsel without his client's consent, or improvidently or unadvisedly,² as when, for example, by mistaking the legal effect of the agreement, the counsel admits as true material facts which are not so, and this would prevent a trial of the case on its merits, it will be disregarded.³ So if the stipulation is framed in such a manner that the interest of a party is likely to suffer because of the fraud, collusion or unfairness which has been practiced, it is within the discretion of the court to cause it to be set aside.⁴

§ 372. **Demurrer to evidence.**—The defendant, by demurring to the evidence of the plaintiff, is considered to admit its truth. So the plaintiff is then entitled to all favorable inferences which may reasonably and fairly be drawn from the evidence, whether the facts which constitute his evidence were elicited by direct or by cross-examination.⁵ But a demurrer serves rather as an objection to the competency of the evidence than to its sufficiency and weight; and if, in the opinion of the court, there is evidence sufficient to go to the jury, it is its duty to overrule the demurrer.⁶

¹ *Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 447; *Hong Kong & Shanghai Banking Co. v. Cooper*, 114 N. Y. 388.

² *Sperb v. Railroad Co.*, 57 Hun, 588.

³ *Ward v. Clay*, 82 Cal. 502.

⁴ *Stonesifer v. Kilburn*, 94 Cal. 33; *Powell v. Turner*, 139 Mass. 97.

⁵ *Hawley v. Dawson*, 16 Oreg. 344; *Hopkins v. Bowers*, 111 N. C. 175; *City of St. Louis v. Missouri Pac. R. Co.* (Mo., 1893), 21 S. W. Rep. 202; *Healey v. Simpson* (Mo., 1893), 20 S. W. Rep. 881 (in equity). "The demurrant admits the truth of the testimony, and such conclusions as the jury may fairly draw, but not forced and violent inferences. The testimony is to be taken most

strongly against him; and such conclusions as a jury may justifiably draw the court ought to draw." *Pawling v. United States*, 4 Cranch, 221. See, also, *Nuzum v. Pittsburgh, C. & St. L. R. Co.*, 30 W. Va. 228.

⁶ *Shaw v. County Court*, 30 W. Va. 488; 4 S. E. Rep. 430; *Hartman v. Cin. etc. Co.* (Ind., 1893), 30 N. E. Rep. 930; *Pitt v. Texas Storage Co.* (Tex., 1893), 18 S. W. Rep. 465; *Benninghof v. Cubbison*, 45 Kan. 621. "A demurrer to plaintiff's evidence admits the facts the evidence tends to prove. The court is to make every inference of fact in favor of the plaintiff which a jury might infer. If then the evidence is insufficient to support a verdict in his

In a criminal prosecution, where the accused has once pleaded not guilty, the state may hold him to his election of a jury trial and refuse to permit a demurrer to the evidence; and even if it shall join issue on the demurrer, the matter is wholly in the discretion of the court, who may refuse to entertain the plea.¹

§ 373. **Surprise.**—By surprise is meant the introduction of evidence at the trial which causes such a variance between the allegations and the proofs that the adverse party is misled in maintaining his action or defense on the merits.² A party who has thus been surprised must move for a new trial, which should be granted if the variance was material and the party was unjustly treated.³ To warrant a court in setting aside judicial proceedings, which are *prima facie* fair and regular, upon the ground of surprise, it must have been a legal surprise, and the party alleging it must himself have been wholly without fault.⁴

The fact that relevant evidence is introduced at the trial which a party did not expect would be introduced,⁵ or which he is for any reason unprepared to rebut, does not constitute surprise in its technical sense. If the evidence does not give rise to a material variance between the allegation and the proof, so that a new cause of action or a new defense is substituted for the original cause or defense, there is no surprise for which a new trial will be granted. Where the party goes to trial without sufficient preparation, or fails to examine witnesses, or is unable to produce evidence upon some point entirely within and relevant to the issue, to meet the unexpected evidence of his adversary, he must abide the conse-

favor, the demurrer should be sustained." *Donohue v. St. Louis, etc. R. Co.*, 91 Mo. 360.

¹ *Duncan v. State* (Fla., 1892), 10 S. Rep. 815.

² *Nash v. Town*, 5 Wall. 698; *Anderson's Law Dict.* See *ante*, §§ 22-24.

³ *Kenezleber v. Wahl*, 92 Cal. 202; *Texas, etc. Co. v. Barron*, 78 Tex. 421; 14 S. W. Rep. 698.

⁴ *Lockwood v. Rose*, 125 Ind. 588; *O'Donnell v. Bennett* (Mont., 1892),

29 Pac. Rep. 1044; *Tittman v. Thornton*, 107 Mo. 500; *Griffin v. O'Neill*, 47 Kan. 116. A new trial will not be granted because the successful party perjured himself on a material point if his adversary, knowing the true facts, was unprepared to prove them. *Randall v. Packard*, 20 N. Y. S. 718.

⁵ *Bingham v. Walk*, 123 Ind. 164; *Shotwell v. McElhenny*, 101 Mo. 677.

quences of his own laches; and though in its discretion the court may grant delay, he cannot claim a new trial because he has been surprised.¹ So the mere absence of material witnesses does not give the party a right to claim that he is surprised so as to obtain a new trial, particularly if their absence is the fault of the party, or if he has failed to ask for delay to procure their attendance.²

§ 374. **Rebutting evidence — Nature and use of.**— The primary significance of the word “rebut” is to contradict or oppose. From this word is derived “rebuttal,” which is frequently used as equivalent to the order and time in which evidence that is intended to contradict other evidence is to be introduced. Thus we speak of evidence “on” or “in” rebuttal.³

“Rebutting evidence” sometimes signifies any evidence which is conclusive, which will overcome a presumption or outweigh other evidence. Again, the expression may mean only evidence which contradicts. In the one case the effect of the rebutting evidence is to avoid the operation of a presumption of law or of fact. In the other the result is to destroy by explanation or denial the effect of affirmative evidence already adduced.⁴ What evidence shall be received in rebuttal is, as we have seen, largely discretionary with the court.⁵ If the evidence which is offered is such that a party should have properly introduced it in making out his original cause of action or his defense, it is not error for the court to reject it if he seeks to introduce it under the guise of rebutting evidence.⁶ But this principle should not be pushed too far;

¹ Davidson v. Wheeler, 17 R. I. 433; Hartman v. Journal, 19 N. Y. S. 401; Dillingham v. Flack, 63 Hun, 629; Jinks v. Lewis, 89 Ga. 787; Crowell v. Harvey, 30 Neb. 570; Francisco v. Benepe, 6 Mont. 243; Smith & Keating Implement Co. v. Wheeler, 27 Mo. App. 16.

² Brady v. Valentine, 21 N. Y. S. 776; 3 Misc. Rep. 19; Cassiano v. Straus, 23 N. Y. S. 1036; Leonard v. German F. Ins. Co., 23 id. 684.

³ See Anderson's Law Dict.

⁴ Anderson's Law Dict., citing

Fain v. Cornett, 25 Ga. 186; People v. Page, 1 Idaho, 194; Butterfield v. Gilchrist, 63 Minn. 155; State v. Claire, 41 La. Ann. 1067; Collins v. Glass, 46 Mo. App. 297.

⁵ See § 375.

⁶ Young v. Brady, 94 Cal. 128; 29 Pac. Rep. 489; Belden v. Allen, 61 Conn. 173; Shearer v. Middleton, 88 Mich. 621; 50 N. W. Rep. 737; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476; O'Connell v. People, 87 N. Y. 377.

nor is the rule applied with much strictness. Evidence which is corroborative or cumulative of other evidence already offered by a party, but which does not at the same time contradict any affirmative adverse evidence or tend to overthrow any presumption, is not admissible in rebuttal. But the mere fact that certain evidence has, or may have, a tendency to corroborate other evidence which the party has introduced to substantiate his cause of action so that it could more appropriately have been introduced as evidence in chief, does not necessarily render it inadmissible in rebuttal. The party should not be deprived of his right to contradict and weaken the evidence of his opponent because the only means available consists of evidence which he might have used to confirm and strengthen his original case.¹ So, though the introduction of cumulative evidence is not to be encouraged, such evidence has often been held to be admissible in rebuttal where one's witness has been directly contradicted as to some material fact in issue. Here the party may introduce another witness to testify to the same fact as the witness whose evidence was contradicted.²

Where the office of rebutting evidence is to overcome a presumption, evidence of a fact which was irrelevant or inadmissible on the direct examination may be introduced in rebuttal to overcome a presumption created by the adverse party's evidence.³ This evidence which is offered in rebuttal, though it may not have been competent because of its irrelevancy or for some other reason as evidence-in-chief to support

¹ *State v. Magoon*, 50 Vt. 333.

² *Green v. Gould*, 3 Allen (Mass.), 465; *Sherwood v. Titman*, 55 Pa. St. 77; *Romer v. Center* (Minn., 1893), 54 N. W. Rep. 1052; *Kansas City, etc. R. R. Co. v. McDonald*, 51 Fed. Rep. 278; 2 C. C. A. 153; *Cogswell v. West St. & N. E. Elev. Ry. Co.*, 3 Pac. Rep. 411; 5 Wash. St. 446; *East Tenn. etc. Co. v. Hesters* (Ga., 1893), 15 S. E. Rep. 828; *Waterman v. Chicago & A. R. Co.*, 52 N. W. Rep. 247; 82 Wis. 613.

³ *Winslow v. State*, 92 Ala. 78; *First Nat. Bank v. Clark*, 134 N. Y.

368; *Branstetter v. Morgan* (N. D., 1893), 55 N. W. Rep. 758; *Zacharie v. Franklin*, 12 Pet. 151; *Southern Pac. Ry. Co. v. Rauh*, 49 Fed. Rep. 696; 1 C. C. A. 416; *Miner v. Baron*, 30 N. E. Rep. 481; 131 N. Y. 677; *Schott v. Youree* (Ill., 1892), 31 N. E. Rep. 591; *Bruner v. Wade* (Iowa, 1892), 51 N. W. Rep. 251; *Hopkins v. Bowers*, 111 N. C. 175; *Louisville, etc. Co. v. Crayton*, 69 Miss. 152; *Medlin v. Wilkins*, 1 Tex. Civ. App. 465; *Sheahan v. National S. S. Co.*, 66 Hun, 48.

the case of the party, has been rendered competent by the action of the adverse party.¹ So, where a party brings out a part of a conversation, his adversary should in fairness be allowed in rebuttal to elicit the residue from the witness, to explain the earlier portion or rebut any adverse inferences or presumptions which may be drawn therefrom by the jurors.²

§ 375. Order of proof — Evidence offered by the party after he rests.— The party who has the right to open and close will not be allowed to develop his case in part only. It is usually considered proper to require him to introduce all the evidence he may have to support his case, though he need not anticipate the evidence of his adversary and attempt to rebut it before it is offered. Each party should be compelled to exhaust his evidence, and neither should be permitted to withhold evidence for the purpose of gaining an unfair advantage over his opponent by producing evidence as in rebuttal which should, because of its relation to the facts in issue, be offered in chief.³

After the evidence in chief on both sides has all been received, the party who has the right to open and close may offer evidence in rebuttal intended to destroy or overcome the effect of some particular evidence which the adverse party has attempted to prove as a part of his case. But the order and time of introducing evidence are largely in the discretion of the court, and if the evidence which is offered is relevant, and if the failure of the party to introduce it at the proper time and in its proper order is not due to a lack of diligence

¹ O'Brien v. Weiler, 68 Hun, 64; 55 N. W. Rep. 88; Blewett v. Gaynor, 77 Wis. 378; Dunn v. People, 29 N. Y. 523; Blake v. People, 73 N. Y. 586; State v. Hunsaker, 16 Ore. 497; Union Pac. Ry. Co. v. Chicago, etc. Co., 51 Fed. Rep. 309; York v. Pease, 2 Gray (Mass.), 282; Cushing v. Billings, 2 Cush. (Mass.) 158; Brown v. Marshall, 120 Ind. 323; Easley v. Miss. Pac. Ry. Co., 20 S. W. Rep. 1073; McDermott v. Chicago, etc. Co. (Wis., 1893), 55 N. W. Rep. 79; Mutual L. Ins. Co. v. Thomson (Ky., 1893), 22 S. W. Rep. 87; Lamance v. Byrnes, 17 Nev. 197.

² Haver v. Schuyhart, 48 Mo. App. 50; Schwarz v. Wood, 67 Hun, 648; Swift Elec. L. Co. v. Grant, 90 Mich. 469; 51 N. W. Rep. 539; Scott v. People (Ill., 1892), 30 N. E. Rep. 329; House v. Lockwood, 63 Hun, 630.

³ Hamilton Buggy Co. v. Iowa Buggy Co. (Iowa, 1893), 55 N. W. Rep. 496; Ankersmit v. Bluxome, 48 Hun, 1; Casteel v. Millison, 41 Ill. App. 61; Thatcher v. Stickney (Iowa, 1893),

on his part, the court may re-open the case to admit it, not only after the party has rested, but even after the argument has begun.¹

§ 376. Materiality and sufficiency of newly-discovered evidence.—The power to grant a new trial because of newly-discovered evidence is to a large extent a discretionary power,² and to call forth its exercise the court should be satisfied that the new evidence is reasonably conclusive and of such force and sufficiency that had it been admitted the verdict which was rendered in the trial would have been set aside as against the evidence.³

It is the policy of the law to make an end of litigation and to render necessary litigation as inexpensive as possible. For this reason the courts are chary in granting retrials upon the

¹ *Taylor v. Cayce*, 97 Mo. 242; *Hill v. Miller*, 50 Kan. 659; *Fogarty v. State*, 80 Ga. 785; *State v. Pratt*, 98 Mo. 482; *Kimball v. Saguin* (Iowa, 1892), 53 N. W. Rep. 116; *Gregg v. Mallett*, 111 N. C. 74; *Owens v. Gentry*, 30 S. C. 490; *Des Moines Sav. Bk. v. Hotel* (Iowa, 1893), 55 N. W. Rep. 67; *State v. Maher*, 74 Iowa, 77; *Kansas City, etc. Co. v. McDonald*, 51 Fed. Rep. 178; *Lewis v. Alkire*, 32 W. Va. 504; *Schuman v. Pilcher*, 36 Ill. App. 43; *Shahan v. Swan* (Ohio, 1892), 26 N. E. Rep. 222; *Cousins v. Partridge*, 79 Cal. 224; *Jacksonville, etc. v. Peninsular, etc. Co.* (Fla., 1892), 9 S. Rep. 661; *McNutt v. McNutt*, 116 Ind. 545; *Jobbins v. Gray*, 34 Ill. App. 208; *Blackman v. State*, 80 Ga. 785. The reception of evidence by the court after the jury's deliberations have begun has been held not reversible error. *Keeveny v. Ottman*, 26 Wkly. L. Bul. 65; *McComb v. Insurance Co.*, 48 N. W. Rep. 1038. So a judgment not objected to when rendered will not be set aside because the court admitted evidence thereafter. *Clavey v. Lord*, 87 Cal. 413; *Meserve v. Folsom*, 62 Vt. 504. In *State v.*

Magoon, 50 Vt. 333, the court said "the order in which testimony shall be admitted is one of practice rather than of strict right, and may, in the discretion of the court, be varied to meet the exigencies of a given case without error being predicable thereon, unless it is manifest that the variance has operated to surprise or in some way work a legal disadvantage to the excepting party."

² *State v. Carlos* (S. C., 1893), 16 S. E. Rep. 832.

³ *City of Chicago v. Edson*, 43 Ill. App. 417; *Wilson v. Heath*, 68 Hun, 209; *Finelite v. Finelite*, 68 Hun, 82; *Uppington v. Keenan*, 67 Hun, 648; *Hilburn v. Harris* (Tex., 1893), 21 S. W. Rep. 572; *State v. Myers* (Mo., 1893), 22 S. W. Rep. 332; *Williams v. United States*, 137 U. S. 113. "A new trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." *Stephens's Dig.*, art. 143.

production of new evidence by the defeated party, who has little to lose and everything to gain by a new trial. Something more must be produced as new evidence than weak or unsatisfactory evidence which would not have changed the result had it been introduced, or which is readily reconcilable with either side of the case.¹ Not only must the sufficiency of the evidence be shown, but its materiality and relevancy must appear as well. If the new evidence would not have been admissible at the trial because of its irrelevancy or otherwise, then its sufficiency need not be considered, while, on the other hand, its relevancy alone is not enough if it would not change the result in a new trial.² The material character of the new evidence and the manner in which it would have influenced the result of the trial must be affirmatively and explicitly shown in reasonable detail in the application and accompanying affidavits. Nothing should be left to inference or conjecture on these important points.³

§ 377. Diligence of party offering new evidence must be shown.—A party who moves for a new trial because of new evidence must show affirmatively and specifically⁴ the reasons for his failure to produce the witness at the trial, and he must convince the court that he was not guilty of delay or negligence.⁵ The fact that the newly-discovered

¹ Laing v. Rush, 66 Hun, 635; Whalen v. New York, 17 Fed. Rep. Helmke v. Stetler, 69 Hun, 109; 72.

Eddy v. Newton (Tex., 1893), 22 S. W. Rep. 533; Field v. Com. (Va., 1893), 16 S. E. Rep. 835; Gaddis v. State (Ga., 1893), 16 S. E. Rep. 931; Humphrey v. State (Wis., 1891), 47 N. W. Rep. 836.

² Thompson v. Thompson, 88 Cal. 110. "The unconsidered evidence must be such as reasonable diligence on the part of the party asking for the rehearing could not have secured at the former trial; it must be material, not merely cumulative, corroborative or collateral, and be such as ought to produce important results on its merits." Codman v. Verm. etc. Co., 17 Blatchf. (U. S.) 3; Dower v. Church, 21 W. Va. 57;

³ Shewalter v. Williamson, 125 Ind. 373; Grayson v. Buchanan (Va., 1891), 13 S. E. Rep. 457; Roberts v. Johnstown Bank, 14 N. Y. S. 432.

⁴ Etowah G. M. Co. v. Exter (Ga., 1893), 16 S. E. Rep. 991.

⁵ Chicago E. & B. P. Co. v. Johnson, 44 Ill. App. 224; Coffey v. Procter Coal Co. (Ky., 1892), 20 S. W. Rep. 286; Weinberg v. Soms (Cal., 1893), 33 Pac. Rep. 341; Succession of Coste, 43 La. Ann. 144; Queen v. Bell, 22 N. Y. S. 398; Briel v. Buffalo, 68 Hun, 219; Broat v. Moore, 44 Minn. 468; Briggs v. Rush, 1 Tex. Civ. App. 19; State v. Ginger, 80 Iowa, 574; Keisling v. Readle, 1 Ind. App. 240.

evidence is relevant and material and will probably result in a change in the verdict on a new trial will not excuse the party's original negligence,¹ if he fails to show a good reason for not producing it at the trial; and *a fortiori* this is the case where the moving party suppressed the evidence himself.² The application for a new trial is usually accompanied by the affidavits of the party. They should set forth in detail the various steps which have been taken by him to obtain the evidence at the trial, and the reason why the new evidence was not offered, in order to satisfy the court of his diligence.³

§ 378. Newly-discovered evidence must not be cumulative or impeaching merely.—A new trial should be granted on the ground of new-discovered material evidence only when it is positively shown that the evidence is not cumulative merely,⁴ or argumentative,⁵ unless the testimony on the earlier trial was very unsatisfactory,⁶ or the verdict was rendered upon a mere numerical preponderance of witnesses which the cumulative evidence would have counteracted.⁷ But an exception to the rule that a new trial will be refused if newly-discovered evidence is cumulative is recognized where the new evidence is cumulative of the admissions made by an adverse witness favorable to the moving party,⁸ or of the evidence of an adverse witness on his cross-examination. Neither should a new trial be granted because of newly-discovered evidence, the sole effect of which would be to contradict or otherwise impeach

¹ *Kansas City, etc. Co. v. Philips* (Ala., 1893), 13 S. Rep. 65; *Fitzgerald v. Brandt* (Neb., 1893), 54 N. W. Rep. 992.

² *Mills v. Husson*, 63 Hun, 632.

³ *Bank v. Gilmore* (N. D., 1893), 54 N. W. Rep. 1032; *McDonald v. Coryell* (Ind., 1893), 34 N. E. Rep. 7.

⁴ *First Nat. Bank v. William Ruehl Co.*, 33 Ill. App. 121; *Davis v. Mann*, 43 Ill. App. 401; *Wilson v. Heath*, 68 Hun, 209; *Douglass v. Anthony*, 45 Kan. 439; *Elmborg v. St. Paul C. R. Co.* (Minn., 1893), 52 N. W. Rep. 639; *Sweat v. State* (Ga., 1893), 17 S. E. Rep. 273; *King v. State*, 91 Tenn. 617; *People v. Urquidias*, 96 Cal. 239; *Com. v. Brown*,

7 Kulp, 103; *State v. Hendrix* (La., 1893), 12 S. Rep. 621; *People v. Hong*, 92 Cal. 41; 27 Pac. Rep. 1096; *Maurer v. State*, 129 Ind. 587; *Williams v. Com.* (Ky., 1892), 18 S. W. Rep. 364; *Weitling v. Millston*, 77 Wis. 523; *Langdon v. People*, 133 Ill. 382; *State v. Potts* (Iowa, 1892), 49 N. W. Rep. 845; *State v. Stowe*, 3 Wash. St. 206.

⁵ *Thompson v. Thompson*, 88 Cal. 110.

⁶ *Louisville, N. O. & T. Ry. Co.*, 69 Miss. 152.

⁷ *Bulkin v. Ehret*, 29 Abb. N. C. 63.

⁸ *White v. Nafus* (Iowa, 1892), 51 N. W. Rep. 5.

the evidence of some witness whose evidence was sufficiently credible or corroborated.¹ So a new trial should not be granted merely because a witness subsequently to the trial admits that he swore falsely,² or makes statements contradictory of what he said on the witness stand.³

§ 379. **Writ of error**—When employed at common law.—An appeal or *appellatio* as defined by Blackstone and other writers on the common and the civil law was a proceeding the use of which was, to a large extent, confined to courts of equity, admiralty and ecclesiastical jurisdiction, whose procedure was modeled after the rules of the Roman civil law. It was, as the word implies, an appeal or application for relief against the alleged injustice of an inferior court, and by the civil law the whole proceeding was removed to the appellate court, and the matter was reviewed and retried by that court both as to the facts and the rules of law involved.⁴ The purpose of the common-law "writ of error," on the other hand, was not primarily to procure a retrial of the whole subject by the supervisory court, for the reason that the trial at *nisi prius*, being always by a jury, a retrial in the court of error of the issue of fact involved by the same method was not possible. The theory of this writ was that the issue of fact had been properly decided by the jury on sufficient evidence, but that in case it had not, or if an erroneous decision of any rule of law had been made, the error would appear at once upon an inspection of the record itself, or it might be more clearly and specifically pointed out by the assignment of error. Thus, a writ of error might be brought for a notorious or open mistake in any part of the record, or

¹ *Fist v. Fist* (Colo., 1893), 32 Pac. Rep. 719; *W. U. T. Co. v. Haman* (Tex., 1893), 20 S. W. Rep. 1133; *Keith v. Knoche*, 43 Ill. App. 161; *Sweigert v. Finlay*, 144 Pa. St. 266; *Green v. Beckner*, 3 Ind. App. 39; *State v. Potter*, 108 Mo. 424; *Pease v. State* (Ga., 1883), 16 S. E. Rep. 113; *State v. Potts*, '83 Iowa, 317; *Marable v. State*, 89 Ga. 425; *People v. Loui*, 27 Pac. Rep. 295; 90 Cal. 377; *State v. Chambers*, 43 La. Ann. 1108; 10 S. Rep. 247; *Maurer*

v. State, 129 Ind. 587; 29 N. E. Rep. 392; *Hudspeth v. State*, 55 Ark. 323; *Russell v. Nall*, 79 Tex. 644; 15 S. W. Rep. 635; *Vanderburg v. Campbell*, 64 Miss. 89.

² *Hoy v. Chicago, etc. Co.*, 46 Minn. 269.

³ *State v. Workman* (S. C., 1893), 16 S. E. Rep. 770.

⁴ *Hestres v. Brennan*, 50 Cal. 217; *United States v. Wonson*, 1 Gall. 13. See, also, *Anderson's Law Dict.*

for any omission, irregularity or informality in the process or committed at the trial.¹ The proceeding under the writ of error affected the record alone which was removed into the higher court, and on the denial of the allegation of error an issue was raised placing the burden of proof on the party alleging the error in the record to prove its existence affirmatively.²

In most of the states of the American Union the proceeding by which the judgment of an inferior court is reviewed by another court exercising supervisory powers, though termed an appeal, is substantially and in principle the common-law writ of error regulated and modified as to details by statutory provisions. So far as these modern appellate proceedings involve a reconsideration of the evidence which has been given in the lower court, they are regulated rather by the principles of the common law than by the rules governing appeals in admiralty and ecclesiastical courts.

§ 380. The powers of appellate tribunals in relation to the evidence received in the trial court.—The weight of evidence and the credibility of witnesses are for the jury exclusively, and the general rule is that the appellate court will not, either in civil or criminal cases, review the evidence merely because it may have been of a weak, contradictory or conflicting character,³ provided that upon an inspection of the

¹ "At common law a writ of error might be had for an error apparent on the record, or for an error in fact, but not for an error in law not appearing on the record; hence anything alleged *ore tenus* and overruled could not be assigned for error. To remedy this evil was the object of the statute of Westminster. Under its provisions a bill of exceptions is founded on some objection in point of law to the opinion and direction of the court, either as to the competency of a witness, the admissibility or the legal effect of evidence, or other matter of law arising from facts not denied in which either party is overruled by the court. The seal attests that the exception was

taken at the trial. If the bill contains matter falsely or untruly stated, the judge ought to refuse to affix his seal." *Wheeler v. Winn*, 53 Pa. St. 126.

² *Burkhalter v. State*, 58 Pa. St. 376; *Bragg v. Danielson*, 141 Mass. 195.

³ *Board of Com'rs Pulaski Co. v. Shields*, 29 N. E. Rep. 385; 130 Ind. 6; *Aultman v. Ritter*, 81 Wis. 395; *Belles v. Anderson*, 38 Ill. App. 126; *Vowels v. Com.*, 83 Ky. 193; *Bull v. Wagner* (Neb., 1892), 49 N. W. Rep. 1130; *Smith v. State*, 11 Pac. Rep. 908; 35 Kan. 618; *Cooper v. Perry*, 27 Pac. Rep. 946; 16 Colo. 436; *Rosenthal v. McMann*, 29 Pac. Rep. 121; 93 Cal. 505; *Graves v. Griffith*, 3 Wash. St. 742; *Allen v. Kirk*, 81

record there is no such manifest preponderance of evidence on the side of the defeated party as will show that the verdict as rendered is erroneous or unjust.¹

A verdict will not be reversed on appeal which was based upon facts which were shown in evidence, the legitimate inferences from which were uncertain or controvertible. If the facts which were proved are capable of more than one construction in the minds of persons of average intelligence, or if the evidence is such that reasonable men may, in considering it, arrive at different conclusions, the decision of the jury is final where the issue of fact was clearly and fairly submitted to them.² If there is any evidence to sustain a verdict which is in itself reasonable on all the circumstances of the case, the verdict should not be set aside because of insufficiency of evidence, though the appellate court might have arrived at a different conclusion from the jury on such evidence.³ Where, however, the verdict as it appears from the evidence sent up and contained in the case on appeal is not only against the weight of evidence but is wholly unsupported by any evidence, the appellate court will not hesitate to reverse the judgment of the lower court. Every presumption will be made that the jury acted impartially and fairly, and that their verdict was according to the evidence. Especially is this true where there is a conflict of evidence, and here the supervisory or appellate court will not disturb the verdict, though the evidence may

Iowa, 658; *Bonner v. Beam*, 80 Tex. 152; *Simmons v. Spratt*, 26 Fla. 449; *Powell v. Achey*, 87 Ga. 8; *McBride v. Railroad Co.*, 60 Hun, 585; *Searsmont v. Lincolnville*, 83 Me. 75; *Noyes v. Pugin*, 2 Wash. St. 258.

¹ *Rudolph v. Davis* (Neb., 1892), 53 N. W. Rep. 841; *Lalor v. McDonald*, 44 Mo. App. 439; *San Gabriel Wine Co. v. Behlow*, 94 Cal. 108; *Huffman v. Burr*, 26 Atl. Rep. 367; 155 Pa. St. 218; *Van Vlissenger v. Cox*, 44 Ill. App. 247; *Mansfield v. Rab*, 21 N. Y. S. 65; 66 Hun, 631; *Monstelle v. Bacon*, 66 Hun, 628; *Beveridge v. Parmlee*, 43 Ill. App. 459; *Yadon v. Mackey*, 50 Kan. 630; *Eppert v. Hall* (Iowa, 1893), 32 N. E.

Rep. 713; *Puget Sound R. Co. v. Ingersoll*, 4 Wash. St. 675; *Coleman v. Jones*, 89 Ga. 459; *Wells v. Yarrowborough*, 84 Tex. 660; *Richmond, etc. Co. v. Burnett*, 88 Va. 538.

² *Evansville, etc. Co. v. Weikle* (Ind., 1893), 33 N. E. Rep. 639; *Goff v. Akers*, 21 N. Y. S. 454; *Paige v. Chedsey*, 20 id. 898; *Meentz v. Reiker*, 42 Ill. App. 17.

³ *St. Louis, I. M. & S. R. Co. v. Spann* (Ark., 1893), 20 S. W. Rep. 914; *Eckert v. Rule* (Kan., 1893), 32 Pac. Rep. 657; *Kimball v. Saguin* (Iowa, 1893), 53 N. W. Rep. 116; *Lalor v. McDonald's Adm'rs*, 44 Mo. App. 439; *Shailer v. Corbett*, 61 Hun, 626.

preponderate somewhat against it and call for a different verdict.¹ On the other hand, where the verdict is not against the mere weight of conflicting evidence, but against uncontradicted evidence amounting to positive proof of the fact alleged,² or where the preponderance of evidence against the verdict is so excessive that it is fair to presume that it was rendered only because of the existence of partiality, unfairness or corrupt motives or gross ignorance on the part of the jury, the judgment of the trial court will be reversed.³

The same rules that are held applicable to the review on appeal of a verdict by a jury are also recognized where a jury trial in the lower court is not of right or is waived by the consent of the parties. If the evidence, though it is conflicting, tends to or is sufficient to support the judgment, and no errors of law appear from the record to have been committed, the decision or findings of the judge upon matters of fact will be regarded as final, notwithstanding the appellate court might arrive at a different conclusion upon the same evidence if before it.⁴

¹ *Gayheart v. Patton* (Ky., 1893), 20 S. W. Rep. 912; *Angus v. Foster*, 42 Ill. App. 19; *Kouhn v. Schroth*, 44 id. 513; *Louisville & N. R. Co. v. Kenley* (Tenn., 1893), 21 S. W. Rep. 326.

² *Walton v. Kansas, etc. Co.*, 49 Mo. App. 620.

³ *Lewis v. Pallin*, 48 Mo. App. 657; *Porter v. Sherman Co. Banking Co.* (Neb., 1893), 55 N. W. Rep. 234; *Cole v. National Sch. Furn. Co.*, 45 Ill. App. 273; *Stanfell v. Lewellyn* (Ky., 1893), 22 S. W. Rep. 645; *Reuber v. Crawford* (Neb., 1893), 54 N. W. Rep. 549; *Kummer v. Christopher & Tenth St. R. Co.*, 2 Misc. Rep. 298; *Urias v. Penn. R. R. Co.*, 152 Pa. St. 326; *Gary v. Cole*, 38 Ill. App. 236; *Huber v. Schmocht*, 39 Ill. App. 229; *Marabitti v. Bagolan*, 21 Oreg. 299.

⁴ *Castner v. Richardson* (Colo., 1893), 33 Pac. Rep. 163; *Teeter v. Teeter*, 20 N. Y. S. 259; 65 Hun, 623; *Kehoe*

v. Burns (Wis., 1893), 54 N. W. Rep. 731; *Keesey v. Gage* (Tex., 1893), 21 S. W. Rep. 397; *Tolman v. Crane*, 44 Ill. App. 237; *Com. v. Westinghouse Elec. & Mfg. Co.*, 24 Atl. Rep. 1107; 151 Pa. St. 265; *Gamble v. Ross*, 44 Ill. App. 291; *Brown v. Sullivan*, 3 Ind. App. 211; 29 N. E. Rep. 453; *Smith v. Kipp*, 49 Minn. 119; *Robbins v. City of Fond du Lac*, 82 Wis. 340; *Chase v. Jones*, 84 Me. 107; *Glover v. Holliday*, 109 Mo. 108; *Schuler v. Eckert*, 90 Mich. 165; *Gwyn v. Butler*, 17 Colo. 114; *Worthington v. Worthington*, 32 Neb. 334; *Long v. Langsdale*, 56 Ark. 239; *Redfearn v. Douglas*, 35 S. C. 569; *Markley v. Hull*, 49 N. W. Rep. 1050; 51 Iowa, 109; *Tatum v. Colvin*, 9 S. Rep. 747; 43 La. Ann. 755; *Belford, Clarke & Co. v. Scribner*, 144 U. S. 488; *Cox v. Jones*, 110 N. C. 309. A statutory provision that an appellate court "shall review a cause where trial by jury has been

So, in an appeal from the decision of the chancellor or of a master in equity, the appellate court will not review his findings of fact unless it appears that they are so manifestly erroneous and lacking in evidence to support them as to be unjust or that they are evidently the result of mistake.¹ The decision or finding of fact of a master in chancery, referee or auditor which is confirmed by the court by which he was appointed is equivalent to the verdict of a jury upon the same point, will be presumed to have been based on sufficient evidence, and will be conclusive upon the parties in the appellate court.²

§ 381. Limitations on the number of witnesses.—It is the right of both parties to have all the witnesses heard by the jury who are able to testify of their own knowledge to any material fact which is controverted. The court cannot in such a case limit the number of witnesses, and its action in doing so over an objection which is taken in time will be ground for a new trial.³ For the same reason if a party rely-

waived in the same manner and to the same extent as if it had been tried by a jury "does not, it has been held, mean that the appellate court shall decide upon the weight of the evidence. *Lynch v. Grayson* (N. M., 1893), 32 Pac. Rep. 149. If a plain and manifest error is shown to have been made by the trial judge in his findings of facts they should be reversed. *Metro. Nat. Bank v. Rogers*, 3 C. C. A. 666; 53 Fed. Rep. 776. But a finding of fact will not be disturbed where it can be shown to be erroneous only by discrediting a witness, as the credibility of testimony is for the trial judge exclusively. *Delano v. Jacoby*, 31 Pac. Rep. 290; 96 Cal. 275.

¹ *Ellis v. Ward*, 137 Ill. 509; *Montague v. Stoltz* (S. C., 1893), 15 S. E. Rep. 868; *Dooly Block v. S. L. Rap. T. Co.* (Utah, 1893), 33 Pac. Rep. 229; *Thomas v. Chicago, etc. Co.*, 49 Mo. App. 110; *McGill v. Hawks* (Mich., 1893), 54 N. W. Rep. 707; *Hamlin v.*

Phillips (Cal., 1893), 33 Pac. Rep. 331; *Berry v. Berry*, 24 Atl. Rep. 957; 84 Me. 541; *Davey v. Seiler* (Ky., 1893), 20 S. W. Rep. 375; *Herbert v. Keck*, 35 Neb. 508. The rule stated in the text is also applicable to the findings of fact on conflicting evidence by a surrogate or similar judicial officer. *In re Sherman*, 24 N. Y. S. 283; *In re Snelling's Will*, 136 N. Y. 575.

² *McHugh v. Railroad Co.*, 65 Hun, 619; *Warner v. Hare*, 154 Pa. St. 548; *Crim v. Starkweather*, 136 N. Y. 635; *Knell v. Stephan*, 65 Hun, 624; *Tischler v. Apple*, 30 Fla. 132; *Porter v. Christian*, 88 Va. 730; *Crawford v. Osmun*, 90 Mich. 77; *Witte v. Weinberg* (S. C., 1893), 17 S. E. Rep. 681; *Johnston v. Markle Paper Co.*, 153 Pa. St. 189; *Morrell v. Kelly* (Mass., 1893), 31 N. E. Rep. 755; *Mech. & Trad. Nat. Bank v. Wynant*, 49 Hun, 607; *Levi v. Blackwell*, 35 S. C. 511.

³ *Village of South Danville v. Ja-*

ing upon a misstatement by the judge refrains from introducing material evidence, he will be entitled to a new trial if the judgment is against him.¹ But where there is no contradiction as to the fact to which the witness is to testify, or where the fact, though not proved beyond a reasonable doubt, is immaterial, it has been held repeatedly that the court has a discretion to refuse to permit other witnesses to testify thereto whose evidence would be merely cumulative.²

An exception to the general rule occurs in the case of expert or opinion evidence. Here it has been held that the court may limit the number of experts which may be examined by either party.³

§ 382. Number of witnesses necessary in trials for perjury.—It was at one time a settled rule of law that no conviction of perjury could be had unless upon the oath of two witnesses; for otherwise the single oath of the accused would be met only by the oath of one other person.⁴ But this is no longer the law. The accused in a trial for perjury may be convicted upon the evidence of one witness corroborated by other independent evidence, which, though it need no longer necessarily be "tantamount to another witness,"⁵ must still be so strong, clear, convincing and corroborative⁶ that, with the evidence of the single witness, it shall overcome the oath of the accused and the presumption of his innocence,⁷ and convince the minds of the jury of his guilt beyond a reasonable doubt.⁸ In case several acts of perjury are alleged in

coba, 42 Ill. App. 543; Page v. Krekey, 137 N. Y. 307; Meier v. Morgan, 82 Wis. 289; Greene v. Phenix Ins. Co., 134 Ill. 310. *Contra* (where a default is set aside as a matter of favor), Burhans v. Norwood Park (Ill., 1891), 27 N. E. Rep. 1088.

¹ Hanna v. Barrett, 39 Kan. 446; 18 Pac. Rep. 497.

² Mears v. Cornwell, 73 Mich. 78; Stillwell v. Farwell, 64 Vt. 286; Seekell v. Norman, 73 Iowa, 254; 43 N. W. Rep. 190; Powers v. McKenzie, 90 Tenn. 167; Detroit City Ry. Co. v. Mills, 85 Mich. 634; Owen v. Williams, 114 Ind. 179; 15 N. E.

Rep. 678; Lake Shore, etc. Co. v. Brown, 123 Ill. 162; Counts v. Neer, 70 Tex. 468; 9 S. W. Rep. 46; Barhyte v. Summers, 68 Mich. 341; 36 N. W. Rep. 93.

³ Carpenter v. Knapp, 66 Hun, 632; Sixth Ave. R. Co. v. Railroad Co., 138 N. Y. 548.

⁴ 1 Greenl. on Ev., § 257; 4 Bl. Com. 358; 2 Russell on Crimes, 179.

⁵ 1 Greenl. on Ev., § 257; State v. Peters, 107 N. C. 876.

⁶ Woodbeck v. Keeler, 6 Cow. 118 121.

⁷ State v. Miller, 44 Mo. App. 159.

⁸ Waters v. State, 30 Tex. App.

one indictment, it seems that there must be a corroboration as to each act, for a conviction cannot be secured on any which is thus corroborated though there may be the testimony of a single witness to each act of perjury.¹ But any fact alleged in an indictment for perjury, excepting the falsity of the evidence given under oath by the person and the fact that he did not believe it to be true, may be proved by the testimony of one witness uncorroborated by independent evidence.²

The rule which requires the testimony of a single witness with corroboration in order to justify a conviction of perjury has been confirmed by statute in many of the states. In the absence of such a statute it may be that the prisoner could be convicted without any oral evidence bearing directly upon the *corpus delicti*. So the written admissions of the accused or of those criminally associated with him, or documentary evidence found in his possession, and acted on by him as true, may, if strong, be regarded as equivalent to the testimony of a single witness.³ But the authenticity of such documents would have to be clearly shown.

§ 383. Number of witnesses in trials for treason.—At the common law, prior to the enactment of the statutes of 1 Edw. VI., ch. 12, and 5 and 6 Edw. VI., ch. 11, a person might have been convicted of treason upon proof by one witness alone. Those statutes provided, and the provision has been adopted into the constitution of the United States,⁴ and into most of the state constitutions, that no person shall be convicted of high treason “unless upon the sworn testimony of two witnesses to the same overt act or on confession in open court.”

284; *State v. Gibbs*, 10 Mont. 213; *United States v. Wood*, 14 Peters, 440; *United States v. Hall*, 44 Fed. Rep. 864; *Reg. v. Boulter*, 16 Jur. 135; *State v. Heed*, 57 Mo. 252; *Rex v. Mayhew*, 6 C. & P. 315; *Reg. v. Braithwaite*, 8 Cox C. C. 254. As to the corroboration required, see *Reg. v. Shaw*, 10 Cox C. C. 66; *State v. Blize*, 111 Mo. 464; *People v. Hayes*, 24 N. Y. S. 194; *Heflin v. State*, 88 Ga. 151.

¹ *Reg. v. Virrier*, 12 A. & E. 317,

324; *Williams v. Com.*, 91 Pa. St. 493. If the jury believe the witness is not a “credible witness,” where the testimony of such a witness is required by statute in a prosecution for perjury, they should acquit. *Kitchen v. State*, 29 Tex. App. 45.

² *United States v. Hall*, 44 Fed. Rep. 864; *People v. Hayes*, 24 N. Y. S. 194.

³ *United States v. Woods*, 14 Peters, 440, 441.

⁴ Art. 3, § 3.

The English statute was so construed as to permit a conviction upon the testimony of one witness to one overt act and of another witness to another overt act of the same sort,¹ and such doubtless would be the law in those states of the Union which do not, in their bills of rights, require testimony to the same overt act.

The extra-judicial confession of the accused may be proved by one witness where it is offered in corroboration of the evidence of the witnesses who testify to an overt act;² and generally any collateral fact not involving an overt act of treason may be proved³ in the same manner as in the case of indictments for other crimes.⁴

§ 384. Compelling the calling of the witnesses.—The prosecution in a criminal trial cannot be compelled to call all the witnesses whose names are on the indictment,⁵ or who know anything of the crime which is alleged; nor can it be required to put a particular witness on the stand though he may be present in court in obedience to the service of a subpoena.⁶ The introduction of evidence for the state in a criminal trial being within the province of the prosecuting attorney, his failure to place all his witnesses upon the stand is not

¹ 1 Greenl. on Ev., § 255, citing Lord Stafford's Case, 7 How. St. Tr. 1527.

² Willis' Case, 15 How. St. Tr. 623-625; Grossfield's Case, 26 id. 55, 57.

³ 1 Greenl. Ev., § 255.

⁴ The origin of the English statutory requirement has been by some ascribed to the weight and binding efficacy of the oath of allegiance of the accused (1 Greenl. on Ev., § 255), while the introduction of the rule has been by others attributed to the fact that the clerical judges of early times followed the canon law, which provided that no one shall be condemned as a heretic save on the testimony of two lawful and credible witnesses. Stafford's Case, T. Raym. 408. In the writer's opinion the rule of law requiring two witnesses to an overt act was due solely to the necessity for the adoption of some means

of protecting the subject against royal oppression, which was continually seeking opportunities for the silencing or punishment not only of those whose deeds were obnoxious, but of those whose language was calculated to arouse popular feelings as well.

⁵ Bressler v. People, 117 Ill. 422; State v. Cain, 20 W. Va. 177; State v. Baxter, 82 N. C. 602.

⁶ Com. v. Haskell, 140 Mass. 128; State v. Middleham, 62 Iowa, 150; Selph v. State, 22 Fla. 537; People v. Oliver, 4 Utah, 460; State v. Morgan, 35 W. Va. 260; Hill v. Com. (Va., 1892), 14 S. E. Rep. 330; Territory v. Hanna, 5 Mont. 248; Keller v. State, 123 Ind. 110; 23 N. E. Rep. 1138. *Contra*, People v. Kenyon, 93 Mich. 19; Phillips v. State, 22 Tex. App. 229; Maher v. People, 10 Mich. 212.

ground for dismissing the indictment; nor can it be urged in support of a motion for a new trial if the evidence which was introduced by the state was sufficient to convict the accused. Nor is the prosecution debarred from calling a witness in rebuttal merely because the district attorney has declined to call that witness to testify in chief upon the request of the defendant that he should do so.¹ If, however, the evidence against the prisoner is wholly circumstantial and is met by positive and direct evidence on his part, the refusal of a request that the state be required to put certain persons on the stand who are present in court, and who were eye-witnesses of the event with which it is sought to connect the accused, is reversible error.²

§ 385. Positive and negative testimony.—The number of witnesses as affecting the weight of evidence.—When the occurrence of a certain event is the fact in issue, a witness called to prove its non-occurrence may, if he had a good opportunity of observing it, testify that he did not see or hear it, though unable to say positively that it did not take place;³ and he may also be permitted to testify, if able to give the details,⁴ that he would have heard or seen it if it had happened.⁵ Though the weight and credibility of evidence are for the jury to determine, the court may be permitted to instruct them that the positive testimony of a witness that a certain event has happened, while not conclusive,⁶ is entitled to more weight than the statements of others who say they

¹United States v. Bennett, 17 Blatchf. (U. S.) 357. In this case the court said: "Whether the evidence of the witness was necessary to make out a case for the prosecution belonged to the district attorney to determine for himself. What the defendant would testify to could not be foreseen; and when the defendant's testimony compelled the production of evidence in rebuttal, the rights of the prosecution to present such evidence by the testimony of any witness able to testify to the facts is not open to question."

²Thompson v. State, 30 Tex. App. 325; People v. Wright, 90 Mich. 362;

People v. Etter, 45 N. W. Rep. 1109; 81 Mich. 370. Cf. Wheelis v. State, 23 Tex. App. 238.

³Abb. Brief on the Facts, § 559, citing Greany v. L. I. R. R. Co., 101 N. Y. 419; Maxwell v. Harrison, 8 Ga. 61.

⁴Burnham v. Sherwood, 14 Atl. Rep. 714.

⁵Abb. Brief on the Facts, § 559; Casey v. N. Y. Cent. R. R. Co., 6 Abb. N. C. 104, 124; Hollender v. Railroad Co., 19 id. 18; Chicago R. R. Co. v. Dillon, 123 Ill. 570.

⁶Lighthouse v. Railroad Co., 54 N. W. Rep. 320.

did not see it,¹ though they were present. The circumstance that the latter admitted that their attention was not called to it would render a verdict based upon their negative evidence subject to reversal.² So the positive knowledge of a fact by one witness is of greater value than the ignorance or forgetfulness³ of another person who may have had equal opportunities of acquiring knowledge.⁴ But where two witnesses with equal opportunities for knowing, testifying from their recollection of a transaction, contradict each other, no inference should be drawn by the jury from the fact that one is more positive in his assertions than the other.⁵ The jury have a right, and it is their duty, to consider the character of a party's witnesses as well as their number; and the fact that the jury have based their verdict on the testimony of one witness and rejected that of several who contradicted him will not justify setting it aside.⁶

§ 386. The discretionary power of the court — Judicial discretion defined and considered.—The phrases "judicial discretion" or "in the discretion of the court" as they are used in this treatise do not refer to any purely arbitrary exercise of the will of the judge, but to a deliberate and careful choice made by him, and to his exercise of a calm judgment unswayed by personal bias or prejudice, but guided by fairness under established legal rules.⁷

We have seen the important part that judicial discretion occupies in the examination of witnesses, in the allowance of amendments where a variance is alleged, in the granting of a continuance, in the admission of cumulative evidence, and in

¹ Canfield v. Asheville, etc. Co., 781; Hinkle v. Higgins (Tex., 1892), 111 N. C. 597; Allen v. Bond, 112 Ind. 523.

² Neil v. State, 79 Ga. 779; Rainey v. N. Y. Cent. R. R. Co., 23 N. Y. S. 80; 68 Hun, 495; Hoffman v. Fitchburg R. Co., 67 Hun, 581. Cf. Horn v. Baltimore & O. R. Co., 54 Fed. Rep. 301; Missouri Pac. R. Co. v. Pierce, 39 Kan. 391.

³ Railsback v. Patton, 52 N. W. Rep. 277.

⁴ McCluskey v. Barr, 54 Fed. Rep.

⁵ Marshall v. Harkenson (Iowa, 1892), 50 N. W. Rep. 559.

⁶ Neal v. Deming, 21 S. W. Rep. 1066; Goldstroph v. Steiner, 155 Pa. St. 28; Chicago, etc. Co. v. Fisher (Ill., 1892), 31 N. E. Rep. 406. Cf. Howell v. Dilts (Ind., 1892), 30 N. E. Rep. 313.

⁷ See Anderson's Law Dict., *Discretion*, citing Platt v. Munroe, 34 Barb. (N. Y.) 293; Tripp v. Cook, 26 Wend. 152; Faber v. Bruner, 13 Mo. 543.

similar matters of detail appertaining to practice and procedure.

Judicial power to determine causes does not exist aside from the law, of which the courts are the creatures and instruments. The judge has no discretion except that which is conferred upon him by the law. That discretion is a legal, not a personal, discretion, and consists in discerning, expounding and carrying out the law as it comes from the law-making power and as it is contained in or modified by prior judicial precedents.¹

To permit the courts to mold the law in any particular case as often as the rights of a particular litigant may seem to demand it would involve the whole body of jurisprudence in uncertainty, and substitute the caprice or personal opinion of a fallible judge for those well-considered and long-established legal rules and principles which are recorded in the statute books, and in the reports of judicial decisions, which, being matter of such notoriety, are or may easily be known beforehand by all men. So when it is said that a matter is within the discretion of the court and is not subject to review or re-examination, legal discretion is referred to, operating within the limits of well-recognized legal rules and implying the presence and exercise of fairness and justice by the court. But on the other hand, the abuse of the discretion possessed by the court, particularly if the abuse shall be palpable and gross, is always subject to review. Such a perversion or abuse of judicial discretion occurs when the court departs from the well-trodden path of legal rules and remedies and permits its action to be swayed and guided by personal will or passion, by the promptings of prejudice or of affection, by bias, by partiality, or by the allurements and rewards of corruption.²

¹ See the remarks of Marshall, C. J., in *Osborn v. United States Bank*, 9 Wheat. 866.

² *White v. Leads*, 51 Pa. St. 189; *People v. N. Y. Cent. R. Co.*, 29 N. Y. 431; *Com. v. Leshner*, 17 S. & R. 164; *Tilton v. Cofield*, 93 U. S. 166; *Ex parte Reed*, 100 id. 23; *United States v. Atherton*, 102 U. S. 375. "The private discretion of a judge is

the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is often caprice; in the worst it is every vice, folly and passion to which human nature can be liable." Lord Camden, cited by Gibson, C. J., in *Commonwealth v. Leshner*, 17 S. & R. (Pa.) 164.

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